Supreme Court, U.S.
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No. 03-031397

IN THE

Supreme Court of the United States

CHRIST CENTER, CHRISTIAN COVENANT OUTREACH CHURCH, HIS WORD MINISTRIES TO ALL NATIONS, CHRISTIAN BIBLE CHURCH, MONTE DE SION (MOUNT ZION) CHURCH, AND CIVIL LIBERTIES FOR URBAN BELIEVERS,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an equal protection challenge to a land-use regulation that implicates uses protected by the First Amendment, such as religious uses, must be analyzed under the same "rational basis" scrutiny as economic regulations implicating no fundamental rights or sensitive uses.

2. Whether government regulation must make religious uses or practices "effectively impracticable," or merely significantly more difficult, to constitute a "substantial burden" on religion for purposes of the Free Exercise Clause or the Religious Land Use and Institutionalized Persons Act of 2000.

STATEMENT REQUIRED BY RULES 14.1 AND 29.6

Pursuant to Supreme Court Rule 14.1, petitioners state that all parties to the proceeding in the court whose judgment is sought to be reviewed are included in the caption. Petitioner Christ Center is currently known as Christ Worship Center International. The United States of America intervened below to defend the constitutionality of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc *et seq.*

Pursuant to Supreme Court Rule 29.6, petitioners state that they are not nongovernmental corporations from which corporate disclosure statements are required.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT REQUIRED BY RULES 14.1 AND 29.6	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	9
I. THIS COURT'S REVIEW IS NEEDED TO DETERMINE THE PROPER STANDARD FOR ASSESSING AN EQUAL-PROTECTION CHALLENGE TO A LAW THAT DISCRIMINATES AGAINST AND AMONG RELIGIOUS USES	10
II. THIS COURT'S REVIEW IS NEEDED TO RESOLVE A CONFLICT OVER THE PROPER STANDARD FOR DETERMINING WHEN A LAW IMPOSES A "SUBSTANTIAL BURDEN" ON RELIGION FOR PURPOSES OF THE FREE EXERCISE CLAUSE AND RLUIPA	19
CONCLUSION	26

TABLE OF AUTHORITIES

CASES Page

Axson-Flynn v. *Johnson*, 356 F.3d 1277 (10th Cir. 2004) 18, 23
Ball v. *Massanari*, 254 F.3d 817 (9th Cir. 2001) 14
Bower v. *Village of Mount Sterling*, 44 Fed. Appx. 670 (6th Cir. 2002) 14
Brown v. *Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525 (1st Cir. 1995) 17
Christian Gospel Church v. *City & County of S.F.*, 896 F.2d 1221 (9th Cir. 1990) 20
Church of the Lukumi Babalu Aye, Inc. v. *City of Hialeah*, 508 U.S. 520 (1993) 16, 23
City Chapel Evangelical Free Inc. v. *City of South Bend ex rel. Dep't of Redev.*, 744 N.E.2d 443 (Ind. 2001) 17
City of Cleburne v. *Cleburne Living Ctr.*, 473 U.S. 432 (1985) ..... *passim*
City of New Orleans v. *Dukes*, 427 U.S. 297 (1976) 14
Congregation Kol Ami v. *Abington Township*, 309 F.3d 120 (3d Cir. 2002) 12
Cornerstone Bible Church v. *City of Hastings*, 948 F.2d 464 (8th Cir. 1991) 11
Employment Div. v. *Smith*, 494 U.S. 872 (1990) 7, 16, 23
First Covenant Church v. *City of Seattle*, 840 P.2d 174 (Wash. 1992) 22, 24
Fraternal Order of Police Newark Lodge No. 12 v. *City of Newark*, 170 F.3d 359 (3d Cir. 1999) 24
Gaylor v. *United States*, 74 F.3d 214 (10th Cir. 1996) 19
Grosz v. *City of Miami Beach*, 721 F.2d 729 (11th Cir. 1983) 21

TABLE OF AUTHORITIES—continued

Page

Islamic Ctr. of Miss., Inc. v. *City of Starkville*, 840 F.2d 293 (5th Cir. 1988) 22, 23
Jolly v. *Coughlin*, 76 F.3d 468 (2d Cir. 1996) 22
Kirkpatrick v. *Seligman & Latz, Inc.*, 636 F.2d 1047 (5th Cir. 1981) 14
Kissinger v. *Board of Trs.*, 5 F.3d 177 (6th Cir. 1993) 16, 17
Knight v. *Connecticut Dep't of Pub. Health*, 275 F.3d 156 (2d Cir. 2001) 17
Leebaert v. *Harrington*, 332 F.3d 134 (2d Cir. 2003) 17
Lyng v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) 21
Marks v. *City of Chesapeake*, 883 F.2d 308 (4th Cir. 1989) 13
McCarron v. *United States*, 12 Cl. Ct. 582 (Cl. Ct. 1987), *aff'd*, 846 F.2d 78 (Fed. Cir. 1988) 14
Miller v. *Reed*, 176 F.3d 1202 (9th Cir. 1999) 18
Mississippi Univ. for Women v. *Hogan*, 458 U.S. 718 (1982) 13
Palmore v. *Sidoti*, 466 U.S. 429 (1984) 13
Rector, Wardens & Members of Vestry v. *City of New York*, 914 F.2d 348 (2d Cir. 1990) 21
Reich v. *Continental Cas. Co.*, 33 F.3d 754 (7th Cir. 1994) 19
San Jose Christian Coll. v. *City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004), *available at* 2004 WL 414923 20
Sherbert v. *Verner*, 374 U.S. 398 (1963) 23, 24, 25
Sierra Club v. *EPA*, 322 F.3d 718 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1043 (2004) 19
Swanson ex rel. Swanson v. *Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694 (10th Cir. 1998) 18
Taylor v. *Johnson*, 257 F.3d 470 (5th Cir. 2001) 14

TABLE OF AUTHORITIES—continued

Page

Tenafly Eruv Ass'n v. *Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 2609 (2003) 17

Texas Monthly, Inc. v. *Bullock*, 489 U.S. 1 (1989) 22

Thiry v. *Carlson*, 78 F.3d 1491 (10th Cir. 1996) .. 21, 22

Thomas v. *Anchorage Equal Rights Comm'n*, 165 F.3d 692 (9th Cir. 1999), *vacated on ripeness grounds*, 220 F.3d 1134 (9th Cir. 2000) 18

Thomas v. *Review Bd.*, 450 U.S. 707 (1981)... 23, 24, 25

United States v. *Batchelder*, 442 U.S. 114 (1979) 14

Village of Euclid v. *Ambler Realty Co.*, 272 U.S. 365 (1926) 2, 9

CONSTITUTION AND STATUTE

U.S. Const. amend. I 2

U.S. Const. amend. XIV 2

42 U.S.C. § 2000bb *et seq.* 19

42 U.S.C. § 2000cc 2

LEGISLATIVE HISTORY

H.R. Rep. No. 106-219 (1999) 26

146 Cong. Rec. E1564-67 (daily ed. Sept. 22, 2000) 3, 25

PETITION FOR A WRIT OF CERTIORARI

Petitioners Christ Center, Christian Covenant Outreach Church, His Word Ministries to All Nations, Christian Bible Church, Monte De Sion (Mount Zion) Church, and Civil Liberties for Urban Believers respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The order of the court of appeals denying petitioners' petition for rehearing *en banc* was entered on November 26, 2003, is unreported, and is reprinted in the Appendix to this Petition ("Pet. App.") at 68a-69a. The underlying opinion of the court of appeals was entered on August 20, 2003, is reported at 342 F.3d 752 (7th Cir. 2003), and is reprinted in the Pet. App. at 1a-35a. The opinion of the United States District Court for the Northern District of Illinois, as amended, was entered on October 17, 2001, is reported at 157 F. Supp. 2d 903 (N.D. Ill. 2001), and is reprinted in the Pet. App. at 43a-67a. The District Court's opinion denying plaintiffs' motion to alter or amend the judgment was entered on March 29, 2002, is unpublished and available at 2002 WL 485380, and is reprinted in the Pet. App. at 36a-42a.

JURISDICTION

The opinion of the court of appeals was entered on August 20, 2003, and the order of the court of appeals denying petitioners' petition for rehearing *en banc* was entered on November 26, 2003. By order of February 3, 2002, this Court granted petitioners' request for an extension until April 2, 2004, within which to file this petition. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

This petition involves the First and Fourteenth Amendments of the United States Constitution and Section 2 of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc. The pertinent text of these provisions is set forth in the Pet. App. at 70a-73a.

STATEMENT OF THE CASE

This case gives the Court an opportunity to answer important questions about its free exercise and equal protection decisions and thereby resolve clear and irreconcilable conflicts in the courts of appeals. It also provides the Court with an opportunity to resolve these conflicts in the land-use context where, as Congress recognized in enacting the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc ("RLUIPA"), religious communities have often experienced discrimination at the hands of zoning boards nationwide. This case provides an especially appropriate vehicle with which to address these issues because, as Judge Posner recognized in his dissent below, the zoning scheme here discriminates against religious communities that are either new, small or composed of mostly minority members. See Pet. App. 25a-35a (Posner, J., dissenting).

A. "Euclidean" Zoning. An understanding of the issues in this petition requires a brief review of zoning schemes generally and their unique intersection with religious communities. The zoning scheme this Court described in *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), aims to implement a comprehensive vision for sound land-use decisions. In this Euclidean utopia, churches are to be tucked away in residential zones, close to their members' homes and away from business, commercial or manufacturing zones.

This vision no longer comports with the reality of many American religious communities, particularly small religious groups in large urban areas. New churches are constantly being formed, often by small groups of devout individuals, many of whom are racial minorities or recent immigrants. Moreover, as Judge Posner observed, this "is not happening in just a Christian context. Within the New Age movement, Muslim, Hindu, and even Jewish traditions, small groups are gathering in storefront meeting houses." Pet. App. 30a (internal quotation omitted). Often, these individuals do not live in the same neighborhoods and are instead bound together only by their shared religious faith.

As these "new, small, or impecunious" religious communities and "obscure sects," Pet. App. 29a, grow and seek more permanent space, that space is seldom available in residential areas that match the stereotype of where a "proper" church should be. New religious communities often find that there are no available properties in the favored residential zones, or that the only available properties are too small and too far from more visible and more accessible areas that would aid church growth. Accordingly, such communities look instead to commercial or business zones for quarters that can both satisfy their requirements for affordable meeting space and situate them in visible and accessible locations. Indeed, as Judge Posner observed below, these religious communities may "trad[e] off the cost to the church of noisy and profane surroundings against the benefits in lower costs of land acquisition and proximity to sinners, including prostitutes, drug addicts, and gang members whose souls are particularly in need of saving." *Id.* at 32a.

As demonstrated in a vast record compiled during Congress's consideration of RLUIPA, these so-called "storefront churches" face enormous challenges from local zoning authorities. See, *e.g.*, 146 Cong. Rec. E1564-67 (daily ed. Sept. 22, 2000). Frequently, religious communities are altogether forbidden in these commercial locations. Or they

might be permitted but, as in this case, only with a special use permit from the local zoning authority. The process for obtaining the requisite permits, moreover, is often subject to the political whim of the majority group. And it frequently entails run-arounds and prohibitive expense for small congregations, which must also face religious, racial, ethnic, socioeconomic and local prejudices. Pet. App. 34a-35a.

B. Factual Background of This Case. The Chicago Zoning Ordinance ("CZO") presents these all-too-typical challenges for urban religious communities. See Pet. App. 2a. Like most Euclidean zoning regimes, the CZO allows churches to locate as of right only in residential ("R") zones. In business ("B") and most commercial ("C") zones, churches are deemed "special uses" that require approval from the City's Zoning Board of Appeals ("ZBA").[1]

1. At the outset of this litigation, numerous nonreligious assembly uses were treated better than religious assembly uses in B and C zones. For example, nonreligious assemblies—including clubs, lodges, community centers, meeting halls, stadiums, auditoriums, and arenas seating up to 2000 persons—were permitted as of right in B and C zones, whereas religious assemblies were not. Moreover, whereas churches were altogether precluded from locating in M zones, private clubs, lodges, and community centers were freely permitted.

While some of this patently discriminatory treatment has been remedied by recent amendments to the City's zoning ordinances, various "mainstream" religions and non-religious

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[1] Specifically, churches are not permitted in C4 zones, though they are possible special uses in C1, C2, and C3 zones. In zones where churches are not an authorized special use—including manufacturing ("M") zones—churches are effectively precluded, though it remains possible in theory to petition the Chicago City Council for a Map Amendment, which rezones the targeted parcel. In addition, any church development of more than two acres (necessary for congregations of roughly 500 or more members) requires the City Council to approve a Planned Development.

groups have retained their favored status.[2] For instance, nonreligious assembly uses such as colleges and universities, funeral parlors, art galleries, offices, gymnasiums, restaurants, music schools, theaters, community homes, labor organization lodges and taverns are still permitted as of right in B and C zones, while churches are not. Also, assembly uses such as taverns, trade schools, restaurants and offices of labor organizations continue to be permitted in M zones, while religious assemblies are flatly banned. And, of course, as Judge Posner noted, existing religious communities continue to enjoy enormous advantages over communities that are new to the religious "'marketplace.'" Pet. App. 30a.

2. Petitioners—five Chicago churches and CLUB, an association of about 30 Chicago-area churches—sought places for religious worship. For these congregations, having a place of assembly for worship and other ministries is integral to their exercise of religion. They need such a place to share their beliefs; teach; pray; help the poor, young and elderly; and engage in numerous other religious activities. See, *e.g.*, Plaintiffs' Statement of Uncontested Material Facts ¶ 27.A-O. Yet petitioners found the acquisition of suitable property difficult, expensive and ultimately impractical.

One reason is that the City's residential zones are fully developed and available lots in residential zones were not of suitable size. For example, R zones "generally do not provide

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[2] In February 2000, as a direct result of this litigation, the City amended its zoning ordinances (1) to require many of the non-religious organizations identified in the text to seek special use permits to locate in B or C zones and (2) to forbid some of these organizations from locating in M zones. However, as Judge Posner explained, "[t]he amendment did not moot [petitioners'] challenge to the old ordinance because they seek damages for the delay they encountered in obtaining permission to build in desirable locations." Pet. App. 34a. If the special use permit requirement is unconstitutional, as Judge Posner concluded it is, "then the delay [petitioners] encountered in finding suitable quarters was the consequence of a constitutional violation and the [petitioners] are entitled to damages." *Id.*

churches with the visibility, accessibility and space they need," and existing church buildings were "extremely scarce." *Id.* ¶¶ 20-23. By contrast, buildings and locations in business and commercial zones have the availability, size, affordability, adaptability, parking, accessibility and visibility necessary to fulfill these congregations' religious ministries. *Id.* ¶ 28.

While trying to gain special use approval for locations in B and C zones, moreover, petitioners experienced the inherent injustices of the City's zoning regime. As Judge Posner recognized in his dissent below, this zoning scheme imposes a "formidable" and "severe burden on new churches." Pet. App. 35a.

For instance, local aldermen frequently led neighborhood opposition to petitioners' special use permit applications. At least once, an alderman simply declared that "he would not allow" a church at a particular location. Pet. App. 49a. In another case, a church located suitable property in a C zone and gained some neighborhood support, only to have the local alderman have the property rezoned as an M district, effectively precluding a church. Pet. App. 50a-51a.

Petitioners variously could not afford to go through the zoning process or could not find a property seller willing to hold the property off the market for the five to six months necessary to acquire a zoning permit. Petitioners found that, even if an owner would contract to sell a property in a B or C zone, the church would have to employ a "zoning contingency" clause because of the serious risk of an adverse ruling from the ZBA. See, *e.g.*, Plaintiffs' Statement of Uncontested Material Facts ¶ 30. Moreover, although the five named churches ultimately found buildings in which to meet, they incurred significant and unnecessary costs that both impeded and delayed their ability to carry out their religious missions as effectively as they could have under a less discriminatory zoning regime.

C. Proceedings Below. In 1994, petitioners initiated this action to redress the City's discriminatory treatment of religious communities. Petitioners alleged *inter alia* that (1) the zoning ordinance violated the Equal Protection Clause by treating religious institutions worse than similar non-religious groups, and small or minority churches less favorably than more well-established churches; and (2) the zoning ordinance (and certain decisions made under it) violated the First Amendment by depriving petitioners of their rights to free exercise of religion, free speech and freedom of assembly, as well as their rights under the "hybrid rights" doctrine articulated in *Employment Division* v. *Smith*, 494 U.S. 872 (1990). In a 2000 amended complaint, petitioners added claims against the City under the newly enacted Religious Land Use and Institutionalized Persons Act.

Following litigation on various preliminary issues, the United States District Court for the Northern District of Illinois considered cross-motions for summary judgment. It ultimately denied petitioners' motion and granted the City's motion. See Pet. App. 43a.

D. The Court of Appeals' Decision And Judge Posner's Dissent. In a 2-1 decision, a panel of the Seventh Circuit affirmed the district court's entry of summary judgment in favor of the City on each of petitioners' claims. Pet. App. 24a-25a. Judge Posner dissented.

1. On petitioners' equal protection claim, the majority (Bauer and Evans, J.J.) affirmed the district court's grant of summary judgment and rejected petitioners' argument that this Court's decision in *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432 (1985), required more than bare rational basis review. The majority concluded that no kind of heightened scrutiny applied. Pet. App. 21a-22a (applying *Cleburne*). Under rational basis review, the court reasoned that any difference in the City's treatment of churches was rationally related to its interest of regulating land use within the city limits. *Id.* at 23a.

In dissent, Judge Posner concluded that the restrictions the City's zoning ordinance placed on religious communities violated the Equal Protection Clause as interpreted in *Cleburne*. Pet. App. 26a-27a (Posner, J., dissenting). As Judge Posner explained, *Cleburne* "identif[ied] a category of sensitive uses or activities, where judges are to be more alert for unjustifiable discrimination than in the usual case in which government regulations are challenged on equal protection grounds." *Id.* at 26a. Noting the inconsistency between the majority's analysis and the opinions of two other circuits, Judge Posner reasoned that churches are just such a sensitive use. *Id.* at 28a (citing *Cornerstone Bible Church* v. *City of Hastings*, 948 F.2d 464 (8th Cir. 1991), and *Congregation Kol Ami* v. *Abington Township*, 309 F.3d 120, 136-37 (3d Cir. 2002)). As he put it, "[R]eligion arouses strong emotions, sectarian rivalry is intense and often bitter, and the mixing of religion and government is explosive." *Id.*

Further, according to Judge Posner, the City's zoning ordinance favors well-established sects that acquired their land in residential areas when such land was more plentiful and affordable, and against "new, small, . . . impecunious" and "obscure sects." Pet. App. 29a. For these reasons, he concluded that "[w]hen government singles out churches for special regulation . . . the risk of discrimination . . . against particular sect[s] is great enough to require more careful judicial scrutiny than in the ordinary equal protection challenge to zoning." *Id.* at 28a-29a.

2. On the substantial burden issue, the majority also held that the City was entitled to summary judgment on petitioners' claims under the Free Exercise Clause and RLUIPA's Section 2(a). In so doing, the majority found petitioners could not establish the substantial burden required by both provisions. The Seventh Circuit held that a "substantial burden" involved something greater than a mere pressure or tendency to coerce individuals to alter their religious beliefs. Instead, the Seventh Circuit imposed a

stricter standard, holding that "a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—*effectively impracticable*." Pet. App. 13a. Under this "effectively impracticable" test, the court of appeals found that petitioners could not show the zoning ordinance violated either the Free Exercise Clause or the "substantial burden" provision of RLUIPA. Despite the difficulties associated with finding suitable properties for churches, the ordinance, according to the majority, did not "render impracticable the use of real property in Chicago for religious exercise." *Id.*[3]

REASONS FOR GRANTING THE PETITION

Since *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), federal and state courts have decided hundreds of cases brought by synagogues, churches, or mosques against municipal zoning laws. This case presents distinct but complementary questions that arise often in these cases and

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[3] The court of appeals also rejected petitioners' argument that the zoning ordinance was not generally applicable because it incorporated discretionary processes and individualized exemptions from general requirements. The court concluded that the zoning ordinance was "generally applicable because the system for seeking exemptions was mandatory for all nonconforming uses." Pet. App. 18a-19a.

As to petitioners' "hybrid rights" claim, the majority concluded that petitioners' claim failed because the companion rights they raised—free exercise, freedom of speech, freedom of assembly, and equal protection—"individually lack[ed] the merit necessary to withstand summary judgment." Pet. App. 19a. As previously noted, however, Judge Posner found merit in petitioners' equal protection argument. *Id.* at 35a.

The majority also rejected petitioners' discrimination claim under RLUIPA, and did not reach the issue of RLUIPA's constitutionality. Pet. App. 10a-15a.

on which the courts of appeals (and state supreme courts) are hopelessly divided. These conflicts, moreover, reflect a fundamental disagreement over the proper interpretation of this Court's decisions in this critically important area of the law.

I. THIS COURT'S REVIEW IS NEEDED TO DETERMINE THE PROPER STANDARD FOR ASSESSING AN EQUAL-PROTECTION CHALLENGE TO A LAW THAT DISCRIMINATES AGAINST AND AMONG RELIGIOUS USES.

As noted by Judge Posner in his dissent below, this case creates a conflict in the circuits and, in so doing, implicates a significant open question in this Court's equal protection jurisprudence after *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432 (1985): whether religious land uses—and other sensitive uses—are entitled only to bare rational basis review or to some degree of heightened review that is "more alert for unjustifiable discrimination." Pet. App. 26a-28a. Put another way, do this Court's equal protection holdings teach, as Judge Posner put it, that "discrimination against sensitive uses is to be given more careful, realistic, skeptical scrutiny by the courts than discrimination against purely commercial activities"? *Id.* at 28a (citing *Cleburne*; *Romer* v. *Evans*, 517 U.S. 620, 634-35 (1996); *Lawrence* v. *Texas*, 123 S. Ct. 2472, 2482 (2003)). The lower courts are in conflict on this critical issue.

1. As noted previously, the majority below applied bare rational basis review to the CZO's differential treatment of religious uses—a scheme that permits religious assemblies as of right only in residential areas but bars them altogether or requires them to secure permits in other zones where similar uses are permitted as of right. Pet. App. 22a-23a. The majority upheld this scheme on the ground that the CZO's differential treatment of religious assemblies (and discrimination against new religious assemblies) is rationally related to Chicago's legitimate interest in regulating land use,

and therefore constitutional. *Id.* In so doing, moreover, the majority held that this Court's decision in *Cleburne* requires nothing more than rational basis review of land-use regulations that discriminate on the basis of religion. However, as Judge Posner pointed out in his dissent, the majority's approach squarely conflicts with the Eighth and Third Circuits' analyses about the appropriate standard of equal protection review to apply to religious land-use cases. *Id.* at 26a (citing *Cornerstone Bible Church* v. *City of Hastings*, 948 F.2d 464, 471-72 (8th Cir. 1991), and *Congregation Kol Ami* v. *Abington Township*, 309 F.3d 120, 133-44 (3d Cir. 2002)).

The Eighth Circuit, in *Cornerstone Bible Church* v. *City of Hastings*, 948 F.2d 464 (8th Cir. 1991), sustained a church's equal protection challenge to a zoning ordinance that is indistinguishable from the CZO in that it permitted private clubs in C-3 zones but excluded churches. *Id.* at 466. In so holding, it applied a more searching inquiry than bare rational basis review. As the Eighth Circuit explained, this Court's equal protection holdings require that the differential treatment of churches and private clubs in a zoning ordinance "must be *relevant*"—not just rationally related—to the objectives the City is attempting to achieve through its ordinance," and that the government bears the burden of proof on this issue. *Id.* at 471 (emphasis added). Because the plaintiff church had shown its similarity to non-commercial uses permitted in C-3 zones, the City bore the burden of demonstrating that its exclusion of the church was "relevant" to a legitimate objective. *Id.*

Unlike the Seventh Circuit majority, moreover, the Eighth Circuit treated as irrelevant the fact that the ordinance there allowed churches in the 45 percent of the city that was zoned residential. And the government's justification that churches did not generate economic activity was problematic in light of the fact that the city permitted other non-profit entities to locate as of right where churches could not. *Id.* at 470-71.

This holding conflicts squarely with the Seventh Circuit's conclusion in this case that the CZO passes muster because it is rationally related to the City's "interest in regulating land-use." Pet. App. 23a.

Like the Eighth Circuit, the Third Circuit recently engaged in an inquiry that is more searching than bare rational basis review. In *Congregation Kol Ami* v. *Abington Township*, 309 F.3d 120 (3d Cir. 2002), the Third Circuit considered a zoning ordinance that, much like the CZO and the ordinance in *Cornerstone Bible Church*, excluded "religious institutions" from a zone where "'country clubs'" were permitted by special exception. *Id.* at 126-27. The Third Circuit noted that this Court "has not yet directly addressed the constitutional incidents of municipal restrictions on use of land by religious institutions." *Id.* at 133. But the Third Circuit nevertheless observed that, although a version of rational basis review is generally applied to cases challenging liberty restrictions by municipalities exercising land use authority, this review must be "meaningful" and alert for "animus or other improper motive." *Id.* at 133, 135.

Applying this careful review, the Third Circuit held that "the initial burden on the complaining party" is "to demonstrate that it is 'similarly situated' to an entity that is being treated differently .... perhaps by citing to the different impact that such entities may have on the asserted goal of the zoning plan." *Id.* at 137. To be "similarly situated," the court explained, is to be "similar in 'kind,' to the uses that are currently permitted." *Id.* at 125.

As to the justification for different treatment, according to the Third Circuit, the proffered reasons must be related to the government's stated goals along a continuum of scrutiny: "Clearly, as the similarity of use wanes, so too the inequality in treatment will be increasingly tolerated under the law." *Id.* at 142. The court remanded for a finding whether the congregation was similarly situated to another, favored entity. *Id.* at 144.

As Judge Posner recognized in his dissent, the majority's decision below conflicts with the Third Circuit's approach in *Kol Ami*. Specifically, the Seventh Circuit failed to consider whether petitioners and those entities permitted as of right in B and C zones were similarly situated. It also failed to perform any meaningful assessment of respondent's justification for its ordinance in light of the City's stated objectives, and it made no effort to determine whether the differential treatment of religious communities served those objectives.

2. The decision below also conflicts with a Fourth Circuit decision not mentioned in Judge Posner's dissent. In that case, which involved the denial of a special use permit to a palmist, the Fourth Circuit observed that whether the sensitive use is a product of "'inaccurate' or 'stereotypic' fear of the mentally retarded," as in *Cleburne*, of "women," (see *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 723-30 (1982)), "or, as alleged here, those who practice 'rituals' thought by some to be heretical, the rule remains the same." *Marks* v. *City of Chesapeake*, 883 F.2d 308, 311 (4th Cir. 1989). That is, the courts must probe for impermissible government blessing of unspoken bias against constitutionally protected interests. *Id.* In so doing, the courts ensure that, although "[p]rivate biases may be outside the reach of the law, . . . the law cannot, directly or indirectly, give them effect." *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984).

Here too, as Judge Posner noted, the record indicates bias against new and obscure sects in favor of more established, mainline sects. Accordingly, it implicates, at the very least, a need for a more searching judicial review than the bare rational basis review given below.

3. The Seventh Circuit's decision also conflicts with *Cleburne* itself. As Judge Posner observed in his dissent, *Cleburne* "expands the boundaries of 'rationality' review" because it "instantiates though it does not articulate the proposition that discrimination against sensitive uses is to be

given more careful, realistic, skeptical scrutiny by the courts than discrimination against purely commercial activities." Pet App. 27a-28a. Like the claimants in *Cleburne*, "[c]hurches are no less sensitive a land use than homes for the mentally retarded, as both *Congregation Kol Ami* . . . and *Cornerstone Bible Church* . . . . recognize, though the reason is different." *Id.* at 28a.

As Judge Posner explained:

> religion arouses strong emotions, sectarian rivalry is intense and often bitter, and the mixing of religion and government is explosive. When government singles out churches for special regulation, . . . the risk of discrimination, not against religion as such . . . but against particular sects, is great enough to require more careful judicial scrutiny than in the ordinary equal protection challenge to zoning.

Id. at 28a-29a. Thus, in a case like this one, which involves "obscure sects" and "new, small, or impecunious" religious communities, *id.* at 29a, *Cleburne* requires a more searching inquiry than bare rational basis review.[4]

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[4] Even assuming, *arguendo*, that the City's actions here would satisfy rigorous rational basis review, this case also presents an apt opportunity to clarify statements in this Court's earlier cases suggesting that religion itself is a suspect (or quasi-suspect) class subject to strict scrutiny review. For example, in *United Sates*. v. *Batchelder*, 442 U.S. 114 (1979), the Court observed that "[t]he Equal Protection Clause prohibits selective enforcement 'based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" *Id.* at 125 n.9 (quoting *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962)) (emphasis added); *see City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976) (referencing "suspect distinctions such as race, religion, or alienage"). Numerous circuits have also suggested that religion may be a suspect class. *See Taylor* v. *Johnson*, 257 F.3d 470, 473 n.2 (5th Cir. 2001); *Ball* v. *Massanari*, 254 F.3d 817, 823 (9th Cir. 2001); *Kirkpatrick* v. *Seligman & Latz, Inc.*, 636 F.2d 1047, 1049 (5th Cir. 1981); *McCarron* v. *United States*, 12 Cl. Ct. 582, 586 (1987), *aff'd*, 846 F.2d 78 (Fed. Cir. 1988); *but cf.*, *Bower* v. *Village of Mount Sterling*, 44 Fed. Appx. 670, 676 (6th Cir 2002) (unreported in Federal Reporter).

4. If something more than bare rational basis review is applied here, there can be little doubt that, as Judge Posner concluded, "the restrictions that Chicago's zoning ordinance places on churches . . . violate the equal protection clause" and "denied plaintiffs the equal protection of the laws." Pet. App. 25a, 35a. As Judge Posner explained, for example, the original zoning ordinance—which is still the subject of a claim for damages—"allowed fraternal lodges and other clubs, community centers, and other meeting places to locate in the commercial zone without obtaining a permit." *Id.* at 33a-34a. This was so even though (a) "[t]he only difference between them and churches is that they are secular" and (b) "[t]here is no difference so far as the use of land is concerned." *Id.* at 34a. And even the revised ordinance retains at least "one completely unreasonable distinction, that between union lodges and churches, putting one in mind of the Spanish Civil War, a struggle between syndicalism and clericalism." *Id.*

Likewise, as Judge Posner further noted, the government's proffered "distinction between churches on the one hand and libraries and colleges on the other hand . . . is only a little more than rational." Pet. App. 34a. And the notion that commercial concerns are preferred to secular ones is "a bad reason" to exclude religious assemblies because "there are very few blocks in Chicago that are purely commercial." *Id.* at 31a. Finally, the justification that churches themselves should not want to be located in commercial areas because of "noise and commotion" is, as Judge Posner concluded, "absurdly paternalistic." *Id.* at 32a.

In short, given the similarity of the religious and secular assemblies that are treated differently within a given zone, and the various unconvincing explanations offered by the government for distinguishing between these uses, respondent's scheme cannot satisfy any kind of "rational-basis plus" review. Because this case squarely presents the issue of what standard applies to land-use regulations that

discriminate against and among religions, this Court should grant review and resolve the circuit conflict on this important issue.

5. Given Judge Posner's endorsement of petitioners' equal protection claim, granting review in this case would also give the Court an opportunity, if it so chooses, to resolve an acknowledged, three-way conflict on a related issue. That is the question of how—and whether—to apply the "hybrid rights" principle articulated by this Court in *Employment Division* v. *Smith*, 494 U.S. 872 (1990). In *Smith*, this Court explained that the only cases in which it had held that the First Amendment barred application of a neutral and generally applicable law to religiously-motivated action were those involving the Free Exercise Clause in conjunction with other specific constitutional protections. See *id.* at 881. Although the Court cited several examples of such "hybrid situation[s]," *id.* at 881-82, *Smith*'s discussion of "hybrid rights" has engendered considerable confusion.[5]

At one extreme, two circuits have brazenly refused to follow this Court's teaching about hybrid rights in *Smith* and declined even to consider a hybrid rights claim when a plaintiff asserts one. For example, the Sixth Circuit has ridiculed the hybrid rights principle as "completely illogical." *Kissinger* v. *Board of Trs.*, 5 F.3d 177, 180 (6th Cir. 1993). And it has held that, "at least until the Supreme Court holds that legal standards under the Free Exercise Clause vary

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[5] As Justice Souter put it:

> If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule . . . . But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.

Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring in part and concurring in judgment).

depending on whether other constitutional rights are implicated, we will not use a stricter legal standard than that used in *Smith* to evaluate generally applicable, exceptionless state regulations under the Free Exercise Clause." *Id.* The Second Circuit has reached the same conclusion. *Knight* v. *Connecticut Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001) (holding that *Smith*'s hybrid rights language is "dicta and not binding on this court"); *accord Leebaert* v. *Harrington*, 332 F.3d 134, 143-44 (2d Cir. 2003) (following *Knight*). And the Second Circuit has squarely acknowledged the conflict with those circuits that have accepted the viability of hybrid rights claims. See *Knight*, 275 F.3d at 167 ("[B]ased on this language from *Smith*, some courts have acknowledged the possibility of hybrid rights claims. Other courts have rejected hybrid rights analysis outright.") (citations omitted); *accord Leebaert*, 332 F.3d at 143-44 (noting circuit split on whether to apply hybrid rights principle at all); *City Chapel Evangelical Free Inc.* v. *City of South Bend ex rel. Dep't of Redev.*, 744 N.E.2d 443, 452-53 & nn.11-12 (Ind. 2001) (plurality opinion) (noting that hybrid rights "arguably [have] not [been] uniformly construed and applied" and citing numerous federal and state cases discussing hybrid rights).

Of the circuits that have accepted the possibility of hybrid rights claims, some—like the majority below—have demanded that the companion claim be meritorious on a freestanding basis. See *Brown* v. *Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 539 (1st Cir. 1995) (rejecting a hybrid rights claim because the free exercise claim was "not conjoined with an *independently* protected constitutional protection") (emphasis added); *Tenafly Eruv Ass'n* v. *Borough of Tenafly*, 309 F.3d 144, 165 & n.23 (3d Cir. 2002) (rejecting a hybrid rights claim because the plaintiffs had not met their full burden of proof on the companion free speech claim), *cert. denied*, 123 S. Ct. 2609 (2003).

By contrast, the Ninth and Tenth Circuits have adopted a more moderate course. They have held that a plaintiff states a hybrid rights claim under *Smith* whenever the companion claim to the Free Exercise claim is "colorable." See *Swanson ex rel. Swanson* v. *Guthrie Ind. Sch. Dist. No. I-L*, 135 F.3d 694, 700 (10th Cir.); *Miller* v. *Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999). As the Tenth Circuit recently explained:

> it makes no sense to adopt a strict standard that essentially requires a successful companion claim because such a test would make the free exercise claim unnecessary. If the plaintiff's additional constitutional claim is successful, he or she would typically not need the free exercise claim and the hybrid-rights exception would add nothing to the case.

Axson-Flynn v. *Johnson*, 356 F.3d 1277, 1296-97 (10th Cir. 2004). In both circuits, moreover, "colorable" has been defined to mean a likelihood, or fair probability, of success on the merits. See *id.* at 1295; *Miller*, 176 F.3d at 1207; *accord Thomas* v. *Anchorage Equal Rights Comm'n*, 165 F.3d 692, 705-06 (9th Cir. 1999) (analogizing the "colorability" test in a hybrid-rights context to the "likelihood of success on the merits" standard for preliminary injunctions), *vacated on ripeness grounds*, 220 F.3d 1134 (9th Cir. 2000) (en banc).

As noted above, the majority below summarily rejected petitioners' hybrid rights claim because it found the companion claims "*individually* lack[ed] the merit necessary to withstand summary judgment." Pet. App. 19a (emphasis added). In so holding, the majority necessarily rejected the "colorable claim" standard used in the Ninth and Tenth Circuits, under which a claimant need only show that its speech, assembly and equal protection claims had a fair probability of succeeding on the merits. *Axson-Flynn*, 356 F.3d at 1295; *Miller*, 176 F.3d at 1207. The decision below

thus squarely conflicts with decisions in those circuits.[6] And, as Judge Posner's dissent demonstrates, petitioners' equal protection claim is at least colorable, therefore establishing the necessary predicate for a hybrid rights claim.

II. THIS COURT'S REVIEW IS NEEDED TO RESOLVE A CONFLICT OVER THE PROPER STANDARD FOR DETERMINING WHEN A LAW IMPOSES A "SUBSTANTIAL BURDEN" ON RELIGION FOR PURPOSES OF THE FREE EXERCISE CLAUSE AND RLUIPA.

The Seventh Circuit's opinion on the meaning of "substantial burden" also widens an existing conflict between those courts of appeals which, like the Seventh Circuit, require religious practice to be made virtually impossible and those that merely require a substantial increase in the cost of religious observance. This Court's guidance is badly needed to resolve this core question of federal law, which arises frequently in the application of the Free Exercise Clause, RLUIPA, and the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb *et seq.*

1. The majority below, like several courts of appeals before it, set a high threshold for finding that government action substantially burdens religion. Observing that RLUIPA has a "broad[] definition of religious exercise," in

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[6] This conflict is, in turn, the outgrowth of a deeper circuit conflict about the proper status of this Court's dicta. In stark contrast to the approach of the Second and Sixth Circuits in *Knight* and *Kissinger*, some circuits consider themselves bound by considered dicta in this Court's opinions. *E.g.*, *Gaylor* v. *United States*, 74 F.3d 214, 217 (10th Cir. 1996) ("[T]his court considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements."); *Reich* v. *Continental Cas. Co.*, 33 F.3d 754, 757 (7th Cir. 1994) (same); *Sierra Club* v. *EPA*, 322 F.3d 718, 724 (D.C. Cir. 2003) ("carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative") (internal quotation marks omitted).

which the exercise at issue "need not be 'compelled by or central to' a particular religion," the Seventh Circuit properly concluded that a "substantial burden" could not be established by the "slightest obstacle to religious exercise incidental to the regulation of land use" or it would render meaningless the word "'substantial.'" Pet. App. 12a. From there, however, the court made an unwarranted logical leap. It concluded that "a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof . . . —*effectively impracticable*." *Id.* at 13a (emphasis added). Applying this standard, the court held that, because the burdens petitioners faced did not make their religious exercise impossible, they were insufficient to establish a substantial burden on religion.

The Seventh Circuit's high threshold is similar to the extreme approach adopted by three other circuits. In a case in which a zoning ordinance prohibited home worship, for example, the Ninth Circuit held that even significant burdens of "convenience and expense" are insufficient for a free exercise violation. *Christian Gospel Church, Inc.* v. *City & County of S.F.*, 896 F.2d 1221, 1223-24 & n.2 (9th Cir. 1990). Recently, the Ninth Circuit reiterated its position on the meaning of "substantial burden" and expressly noted its approach was "entirely consistent" with the Seventh Circuit's "effectively impracticable" standard. *San Jose Christian Coll.* v. *City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004), *available at* 2004 WL 414923, at *8.

Similarly, a panel of the Second Circuit reasoned that, because the "central question in identifying an unconstitutional burden is whether the claimant has been denied the ability to practice his religion or coerced in the nature of those practices," there could be no "substantial burden" absent "coercion in religious practices, or the Church's *inability* to carry out its religious mission in its

existing facilities." *Rector, Wardens & Members of Vestry* v. *City of New York*, 914 F.2d 348, 355 (2d Cir. 1990) (emphasis added). Accordingly, even though the landmarking law at issue there "*drastically* restricted [a] Church's ability to raise revenues to carry out its various charitable and ministerial programs" by building an office tower, no substantial burden was shown. *Id.* (emphasis added).

The Eleventh Circuit has adopted a similarly restrictive standard. It has held that a zoning ordinance that entirely precluded the use of residences for organized religious services did not a create substantial burden because it did not "prohibit religious conduct per se." *Grosz* v. *City of Miami Beach*, 721 F.2d 729, 739 (11th Cir. 1983).

In short, the Seventh Circuit has joined three other circuits in requiring that religious practice be made essentially *impossible* before government action will be viewed as imposing a substantial burden on religion.

2. In contrast to this stringent approach, several circuits and state supreme courts have taken a more moderate view. In so doing, they have recognized that burdens fall along a continuum between those that make religious practice impossible and those that impose merely trivial inconveniences. Middle-ground obstacles can constitute a "substantial burden" on religion under decisions in these circuits.

For example, the Tenth Circuit, following this Court's analysis in *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), concluded that a substantial burden is one that has a "'*tendency* to coerce individuals into acting contrary to their religious beliefs.'" *Thiry* v. *Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996) (emphasis added) (quoting *Lyng*, 485 U.S. at 450). Put another way, it is enough that the government regulation "significantly inhibit or constrain," "meaningfully curtail" or deny "reasonable opportunities" for religious practice. *Id.* (internal quotation

omitted). It need not make religious exercise effectively impracticable. *Id.*[7]

The Washington Supreme Court employed a similar analysis in *First Covenant Church* v. *City of Seattle*, 840 P.2d 174, 183-85 (Wash. 1992). Pointing to this Court's religious taxation cases, that court recognized that "a *financial* burden on religious activity, if too gross, may unconstitutionally infringe on free exercise." *Id.* at 183 (citing *Jimmy Swaggart Ministries* v. *Board of Equalization*, 493 U.S. 378, 391 (1990)); see also *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 23 (1989) (plurality opinion) (taxes may result in an unconstitutional imposition on religious activity where "the tax burden is far from negligible"). For example, where land-use regulation "grossly diminishes the value of the Church's principal asset" it "impermissibly burdens [the] right to free exercise of religion" even if it does not make religious observance impossible or impracticable. *First Covenant Church*, 840 P.2d at 184.

Another leading case in this regard is *Islamic Center of Mississippi, Inc.* v. *City of Starkville*, 840 F.2d 293, 299-303 (5th Cir. 1988). That case, like this one, involved a challenge by a minority religious sect to a city's denial of a special use exemption in a non-residential area. The Fifth Circuit concluded that zoning laws that make religious assemblies "relatively inaccessible within the city limits" and thereby ensure that "churches, synagogues, and mosques [become] accessible only to those affluent enough to travel by private automobile," create an "obvious[] burden [on] the exercise of

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[7] In another decision along these lines, a different panel of the Second Circuit (in an opinion creating an apparent intra-circuit conflict), has explained that "a substantial burden exists where the state 'put[s] *substantial pressure* on an adherent to modify his behavior and to violate his beliefs.'" *Jolly* v. *Coughlin*, 76 F.3d 468, 476-77 (2d Cir. 1996) (quoting *Thomas* v. *Review Bd.*, 450 U.S. 707, 718 (1981)) (emphasis added). This of course is far short of the Seventh Circuit's "effectively impracticable" standard.

religion by the poor." *Id.* at 299. That approach would of course invalidate—or at least preclude summary judgment in favor of—the City's actions here. Respondent's scheme makes urban storefront churches "relatively inaccessible" and thus creates an "obvious" significant burden on petitioners and their congregations, even if it does not make their religious practices "effectively impracticable."

In short, under these more moderate approaches, petitioners would not have had to show that their religious practice was made effectively impossible. They would have to show only that they were significantly inhibited or denied reasonable opportunities to have a house of worship in a B or C zone. Plainly, as Judge Posner put it, petitioners faced that level of "formidable" burden. Pet. App. 35a.

3. The Seventh Circuit's approach also conflicts in principle with this Court's own "substantial burden" decisions. These include *Sherbert* v. *Verner* 374 U.S. 398 (1963), and *Thomas* v. *Review Board*, 450 U.S. 707 (1981), which are the basis for the "substantial burden" standards in RLUIPA (at issue here) and RFRA—and which still apply to at least some free exercise claims after *Smith*, 494 U.S. at 884, including this one.[8]

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[8] For example, this case falls squarely within the "individual exemptions" category recognized in *Smith* and *Lukumi*, under which strict scrutiny review applies to any law that "represents a system of 'individualized governmental assessment of the reasons for the relevant conduct.'" *Lukumi*, 508 U.S. at 537 (quoting *Smith*, 494 U.S at 884). The zoning ordinance creates just such a system of individualized assessments of land-use matters involving religious uses, and is therefore subject to strict scrutiny if a substantial burden can be shown.

To be sure, as the Tenth Circuit recently observed, "courts and commentators are divided on the question" of when the individualized assessments doctrine applies. *Axson-Flynn*, 356 F.3d at 1297. The Seventh Circuit's conclusion that this doctrine does *not* apply here simply expands this growing conflict. Indeed, that decision conflicts with numerous decisions such as a decision of the Washington Supreme Court holding that land-use ordinances that "contain mechanisms for individual

A review of *Sherbert* is instructive because it did not involve government action that even approached making religious practice effectively impracticable, as the Seventh Circuit and several others would require. Instead, it involved a simple denial of unemployment benefits to a Sabbatarian who was fired for refusing to work on Saturday. 374 U.S. at 399-400. Yet this Court squarely rejected the argument that, because all that was at issue was a government "benefit or privilege," there was no substantial burden. Instead, this Court observed that even "conditions and qualifications upon governmental privileges and benefits" frequently "have been invalidated because of their *tendency to inhibit* constitutionally protected activity." *Id.* at 404 & n.6 (emphasis added). Elsewhere, this Court explained that the substantial burden requirement meant, not that the plaintiff must show that the regulation mader her religious observance "effectively impracticable," but simply that the rule put "pressure upon her to forego [a religious] practice." *Id.* at 404.

The same was true in *Thomas* v. *Review Board*, 450 U.S. 707 (1981), another case involving the denial of unemployment benefits to an individual who balked at performing work duties that conflicted with his religious beliefs. The Court reiterated that the government action need not "*compel* a violation of conscience" to place a substantial burden on free exercise. *Id.* at 717. All that is necessary is a "coercive impact" in, for example, "condition[ing] receipt of an important benefit" on the restraint of religious practice, "thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Id.* at 717-18. This

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exceptions" and "invite individualized assessments" are not generally applicable and require strict scrutiny review. *First Covenant Church*, 840 P.2d at 181. It also conflicts with the Third Circuit's decision in *Fraternal Order of Police Newark Lodge No. 12* v. *City of Newark*, 170 F.3d 359 (3d Cir. 1999), which held that a system in which exemptions are given for secular reasons, but are not extended for religious reasons, "must survive heightened scrutiny." *Id.* at 366.

Court again insisted that, even though "the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Id.* at 718. Here again, this is a far cry from showing "effective impracticability."

There can be no doubt that the burdens at issue in this case are "substantial" within the meaning of these decisions. As Judge Posner recognized, the burden on "obscure sects" in this case "was formidable." Pet. App. 29a, 35a. For example, it took one petitioner "three years to find suitable space" through the special use process, whereas equivalent non-religious communities were entitled to locate in such spaces as of right. *Id.* at 35a. This is clearly a "substantial burden" in the sense of decisions such as *Sherbert* and *Thomas* because it has a "*tendency to inhibit* constitutionally protected activity"—in this case communal worship. 374 U.S. at 404 & n.6 (emphasis added).

In sum, the Seventh Circuit's "effectively impracticable" standard departs sharply both from this Court's traditional understanding of "substantial burden" as well as from the appropriate moderate approach taken by a number of circuit and State courts.

* * * *

It is difficult to overstate the practical importance of these issues to American religious life or, indeed, to local governments and their citizens. As Congress found less than four years ago in enacting RLUIPA, "'zoning conflicts between churches and cities have become a leading church-state issue. Disputes have arisen over church soup kitchens or homeless shelters in suburbs, expansion of church facilities, parking squeezes on Sunday, breaches of noise ordinances or disagreements on what kind of meetings the zoning permits.'" 146 Cong. Rec. at E1564. Moreover, hearings held in connection with that legislative effort provided "a substantial record of evidence indicating a widespread pattern of religious discrimination in land use regulation"—

discrimination that especially disfavors "upstart" congregations and communities. H.R. Rep. No. 106-219, at 18 (1999). The Court should take this opportunity to give the lower courts much-needed guidance as to the appropriate legal standards to apply in addressing claims of religious discrimination in the land-use context.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 2, 2004

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS,
SEVENTH CIRCUIT.

No. 01-4030

CIVIL LIBERTIES FOR URBAN BELIEVERS, CHRIST CENTER,
CHRISTIAN COVENANT OUTREACH CHURCH, et al.,
Plaintiffs-Appellants,

v.

CITY OF CHICAGO,
Defendant-Appellee.

Argued Jan. 17, 2003
Decided Aug. 20, 2003
Rehearing En Banc Denied Nov. 26, 2003

Before BAUER, POSNER, and EVANS, Circuit Judges.

BAUER, Circuit Judge.

Appellants, an association of Chicago-area churches and five individual member churches thereof, appeal from the district court's entry of summary judgment in favor of Appellee, the City of Chicago, on Appellants' claims challenging the Chicago Zoning Ordinance ("CZO"), 17 MUNICIPAL CODE OF CHICAGO, ILL., §§ 1-11, under the federal Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 UNITED STATES CODE § 2000cc *et seq.*, and the United States Constitution. For the reasons set forth below, we affirm the decision of the district court.

BACKGROUND

The CZO broadly divides the city into R, B, C, and M zones for residential, business, commercial, and manufacturing uses, respectively. Each zone, in turn, is subdivided into numbered districts and subdistricts. A majority of Chicago land available for development is zoned R. The CZO's stated purposes include the following: (i) "to promote and to protect the public health, safety, morals, comfort, convenience, and the general welfare of the people," and (ii) "to protect the character and maintain the stability for residential, business, commercial, and manufacturing areas within the City, and to promote the orderly and beneficial development of such areas." *See* 17 MUN. CODE CHI. § 2(1), (3)(2001). Churches are permitted uses as of right in all R zones, but are termed Variations in the Nature of Special Uses ("Special Use") in all B zones as well as C1, C2, C3, and C5 districts. All Special Uses, whether of a religious or nonreligious nature, require approval by the Zoning Board of Appeals ("ZBA") following a public hearing. *See id.* §§ 7.3-1(4), 8.4, 9.4, & 11.10. Special Use approval is expressly conditioned upon the design, location, and operation of the proposed use consistent with the protection of public health, safety, and welfare, and the proposed use must not substantially injure the value of neighboring property. *See id.* § 11.10-4. Factoring such expenses as application, title search, and legal fees, as well as appraisal and neighbor notification costs, the aggregate cost of obtaining Special Use approval approaches $5000. Before a church may locate in a C4 district or an M zone, the Chicago City Council must vote in favor of a Map Amendment, effectively rezoning the targeted parcel. *See id.* §§ 9.4-4, 10, & 11.9. Development for church use of land consisting of two or more acres (necessary for congregations exceeding roughly 500 members) requires approval by City Council vote of a Planned Development. *See id.* § 11.11-1(a) & 11.11-3.

Civil Liberties for Urban Believers ("CLUB") is an unincorporated association of 40 to 50 Chicago-area religious or not-for-profit Illinois corporations ranging in size from 15 to 15,000 congregants. Five of these individual member churches[1] joined CLUB as plaintiffs in an action challenging the validity of the CZO. The district court summarized as follows the encounters of the five individual plaintiff churches with Chicago's zoning framework as alleged in Appellants' complaint:

> Christ Center began meeting in a high school auditorium in 1990, but soon experienced difficulties at this location due to various school functions that interrupted weekly worship. As a result, Christ Center began searching for a building to purchase. The church was unsuccessful in locating an appropriate building in any R districts. In the summer of 1992, Christ Center located a suitable building at 1139-43 West Madison in Chicago. The building was located in a C district and Christ Center promptly applied for a special use permit. After completing the application process, Christ Center reached out to gain the support of neighbors and Alderman Theodore Mazola. Most neighbors favored a taxpaying entity in the neighborhood rather than a church and Alderman Mazola stated that he would support the church's special use permit on any street but Madison. The Zoning Board eventually convened a special hearing on September 18, 1992. On October 18, 1992, the special use permit was denied. Christ Center subsequently found a second building in an M district at 123 South Morgan. The owner of the building also agreed to provide financing. However, the Chicago

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[1] Those five Churches are (i) Christ Center; (ii) Christian Covenant Outreach Church ("Christian Covenant"); (iii) His Word Ministries to All Nations ("His Word"); (iv) Christian Bible Church ("Christian Bible"); and (v) Monte de Sion Church ("Mount Zion").

Department of Planning and Development informed Christ Center that it would oppose any rezoning application because the particular area was designated to become an entertainment area and the presence of a church would inhibit such development. Christ Center subsequently choose not to file an application for rezoning. In the fall of 1993, Christ Center obtained property at 4445 South King Drive, successfully obtained a special use permit and now operates a church at this location. Christ Center now claims that it paid substantial sums in attorneys fees, appraisal fees, zoning application charges, title charges and other expenses attempting to find suitable property.

Between 1986 and the summer of 1988, Christian Bible met in a private home. The church eventually outgrew this space and began meeting in a funeral home. The funeral home, however, proved aesthetically and administratively problematic. In 1990, Christian Bible located a suitable building in a B district at 83rd and Essex. Alderman Beavers promptly informed Christian Bible that "he would not allow" a church at that location. Consequently, Christian Bible did not apply for a special use permit at this location. In March 1991, Christian Bible purchased property in another B district at 513-23 East 75th Street. The Park Manor Neighbors Association and Alderman Steele both opposed the church's special use permit application. On May 17, 1991, the permit was denied. Christian Bible then unsuccessfully attempted to sell the building for 10 months. In February 1992, Christian Bible renovated the building to enhance its appearance. During these renovations, the church rented space at another location, or held meetings at private homes. Christian Bible later reapplied for a special use permit which was granted on August 20, 1993 with the support of neighbors in the district. Christian Bible now claims the delay in obtaining a special use permit

prevented the church from obtaining a real estate tax exemption. The church further alleges that it also paid substantial sums in expenses related to the application process and also suffered a decrease in membership. Christian Bible now owns and meets at a church at 6210 S. St. Louis and has successfully obtained a special use permit to operate the church.

From February, 1988 to December, 1993, Mount Zion rented space in a C district at 4545 North Kedzie. During this period, Mount Zion never applied for a special use permit. In 1990, a [Chicago] inspector ordered Mount Zion to vacate the building. In April 1993, Mount Zion located suitable rental property at 3949 North Pulaski, and applied for a special use permit. During this process, the Zoning Board informed Mount Zion that the building lacked adequate parking accommodations for a church and both the building and each parking lot would require special use permits. Alderman Wojcik and a neighborhood group also opposed Mount Zion's application. Consequently, Mount Zion withdrew its application for a special use permit. Mount Zion now owns and meets in a church at 3807 N. Lavergne.

On November 1, 1992, Christian Covenant first rented property in a C district. The owner of the building offered to co-sign a loan enabling Christian Covenant to purchase the property. However, [Chicago] inspectors ordered Christian Covenant to stop using the building as a church without a special use permit. As a result, Christian Covenant did not purchase the building out of fear [Chicago] would not allow the building to be used as a church without a special use permit. Christian Covenant now owns and meets in a church located in an R district.

Between 1990 and 1992, His Word met in the basement of a private home until membership outgrew these

> accommodations. In 1992, His Word located a suitable building in a C district at 1616 West Pershing. On March 27, 1992, the church signed a purchase contract contingent upon the grant of a special use permit. After filing their special use permit application, His Word met with neighbors in the district who generally supported it. Alderman Patrick Huels stated he would neither support nor oppose the application. On three separate occasions, at the request of Alderman Huels, the [ZBA] postponed a hearing on His Word's application. On October 14, 1992, Alderman Huels introduced an amendment to the [CZO] to rezone the property located at 1616 West Pershing from a C district to an M district. After a hearing on December 10, 1992, Alderman William Banks and other aldermen on the Chicago Committee on Zoning of the Chicago City Council voted to recommend approval of the amendment.
>
> Both His Word and Citibank, the owner of the building, opposed the rezoning. On December 15, 1992, the Chicago City Council voted to enact the rezoning amendment changing 1616 West Pershing from a C district to an M district. His Word subsequently withdrew its application for a special use permit; the church spent a considerable sum on filing, attorney's and appraiser's fees. His Word now owns and meets in a church located in an R district.

Civil Liberties for Urban Believers v. Chicago, 157 F.Supp.2d 903, 907-08 (N.D.Ill.2001).

This appeal from the district court's summary judgment ruling in favor of Chicago on Appellants' fourth amended complaint reaches us via a long and tortuous procedural path.[2]

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[2] The procedural history includes an opinion of this Court holding that legislative immunity shields Chicago Aldermen William Banks and Patrick Huels from any liability arising out of their zoning-related actions. Plaintiffs Ira Iglesia de la Biblia Abierta and His Word sought to hold the

Appellants amended their original complaint to remove claims challenging the CZO under the federal Religious Freedom Restoration Act, 42 U.S.C.2000bb *et seq.* ("RFRA"), after the Supreme Court invalidated relevant provisions of RFRA in *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). In February 2000, in response to Appellants' remaining constitutional challenges to the CZO's designation of churches vis-à-vis various nonreligious assembly uses in B, C, and M zones, the City Council amended the CZO to require clubs, lodges, meeting halls, recreation buildings, and community centers to obtain Special Use approval in order to locate within any B and C zones and a Map Amendment in order to locate within any M zone. The amendments also (i) exempt churches from the requirement that a Special Use applicant affirmatively demonstrate that the proposed use "is necessary for the public convenience at that location" and (ii) provide that a Special Use permit shall automatically issue in the event that the ZBA fails to render a decision within 120 days of the date of application. Several months thereafter, Congress reacted to the Supreme Court's decision in *City of Boerne* with the enactment of RLUIPA and Appellants subsequently amended their complaint once more to include claims against Chicago pursuant to RLUIPA.[3]

In addition to the RLUIPA claim, Appellants' final amended complaint argued, in part, that the CZO and the administrative and legislative processes for obtaining Special

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aldermen personally liable for alleged civil rights violations resulting from the aldermen's introduction of legislation intended to rezone 1616 West Pershing Road, effectively preventing its use as a church. *See Iglesia de la Biblia Abierta v. Banks*, 129 F.3d 899 (7th Cir.1997); and *Civil Liberties for Urban Believers*, 157 F.Supp.2d at 908.

[3] Noting that the district court's opinion narrates more thoroughly the procedural history of this case, *see* 157 F.Supp.2d at 905-08, we limit our opinion to include only those procedural details directly relating to our disposition of this appeal.

Use, Map Amendment, and Planned Development approval violate Appellants' rights to (i) free exercise of religion, speech, and assembly under the First Amendment of the United States Constitution, (ii) equal protection under the Fourteenth Amendment of the United States Constitution as well as the Illinois Constitution, and (iii) procedural due process under the Fourteenth Amendment of the United States Constitution. Appellants also claimed that the rezoning of 1616 West Pershing Road ("Pershing") violated His Word's constitutional rights.[4]

In granting summary judgment in favor of Chicago, the district court determined that the February 2000 amendments to the CZO removed "any potential substantial burden" on religious exercise, such that Chicago

> avoid[ed] the preemptive force of any provision of [RLUIPA] by changing the policy or practice that result[ed] in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminate[ed] the substantial burden.

42 U.S.C. § 2000cc-3(e). With respect to Appellants' equal protection claims, the district court concluded that Chicago's zoning scheme is rationally related to a legitimate government purpose and thus constitutional. The district court also rejected Appellants' due process claims, noting that City Council and ZBA legislative procedures and practices afforded Appellants what minimal process is due in zoning cases. In its discussion of Appellants' First Amendment claims, the district court explained that the CZO and its

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[4] Pursuant to 28 U.S.C. § 1367(c), the district court dismissed without prejudice Appellants' claim under the Illinois Religious Freedom Restoration Act, 775 ILL. COMP. STAT. § 35/15.

Special Use provisions are neutral and generally applicable law which do not impermissibly burden the free exercise of religion, and that the operation of a church is subject to zoning laws, even where such operation involves conduct within the core of the First Amendment—here, religious speech and assembly. Finally, while acknowledging that the conduct of Alderman Huels in connection with the Pershing rezoning was "egregious" and perhaps "dishonorable", the district court relied on this Court's decision in *Biblia Abierta*, 129 F.3d at 901-02, to conclude that such legislative action was constitutional insofar as it (i) afforded His Word procedural due process, (ii) was taken subject to neutral and generally applicable ordinances, and (iii) was rationally related to Chicago's legitimate interests in developing the commercial areas adjacent to the parcel while avoiding land-use conflicts.

The district court subsequently denied Appellants' motion, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure ("FRCP"), to reconsider its summary judgment. *See Civil Liberties for Urban Believers v. Chicago*, 2002 WL 485380, No. 94 C 6151 (N.D.Ill. Mar. 29, 2002). This appeal ensued.

ANALYSIS

We review the district court's grant of summary judgment de novo. *See, e.g., Freedom From Religion Foundation v. Bugher,* 249 F.3d 606, 610 (7th Cir.2001). Summary judgment is proper where there is no genuine issue as to any material fact. Such is the case where the nonmoving party has failed to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof, because a complete failure of proof concerning an essential element of his case necessarily renders all other facts immaterial. In such a case, the moving party is entitled to judgment as a matter of law and summary judgment must

issue against the nonmoving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); FED. R. CIV. P. 56(c).

I. *Religious Land Use and Institutionalized Persons Act*

Appellants argue that the CZO violates RLUIPA's substantial burden provision, which requires land-use regulations that substantially burden religious exercise to be the least restrictive means of advancing a compelling government interest, *see* 42 U.S.C. § 2000cc(a), as well as its nondiscrimination provision, which prohibits land-use regulations that either disfavor religious uses relative to non-religious uses or unreasonably exclude religious uses from a particular jurisdiction, *see* 42 U.S.C. § 2000cc(b).[5]

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[5] In relevant part, those provisions read as follows:

§ 2000cc. Protection of land use as religious exercise.

(a) Substantial burdens.

(1) General rule. No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application. This subsection applies in any case in which. . .

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion.

(1) Equal terms. No government shall impose or implement a land use regulation in a manner that treats a religious assembly or

In order to prevail on a claim under the substantial burden provision, a plaintiff must first demonstrate that the regulation at issue actually imposes a substantial burden on religious exercise. RLUIPA defines "religious exercise" to encompass "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," including "[t]he use, building, or conversion of real property for the purpose of religious exercise." 42 U.S.C. § 2000cc-5(7). This definition reveals Congress's intent to expand the concept of religious exercise contemplated both in decisions discussing the precursory RFRA, *see, e.g., Hicks v. Garner*, 69 F.3d 22, 26 n. 22 (5th Cir.1995) (collecting cases defining "substantial burden on religious exercise" under RFRA), and in traditional First Amendment jurisprudence, *see, e.g., Hernandez v. Commissioner*, 490 U.S. 680, 699, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989) (religious exercise as "the observation of a central religious belief or practice" (citations omitted)); *Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 718, 101 S.Ct. 1425, 67 L.Ed.2d 624, (1981) (religious exercise as behavior and beliefs compelled by a particular religion); *Sherbert v. Verner*, 374 U.S. 398, 404, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) (religious exercise as adherence to the central precepts of a religion). Although the text of the statute contains no similar express definition of

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institution on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination. No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusions and limits. No government shall impose or implement a land use regulation that—

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

42 U.S.C. § 2000cc.

the term "substantial burden," RLUIPA's legislative history indicates that it is to be interpreted by reference to RFRA and First Amendment jurisprudence. *See* 146 CONG. REC. 7774-01, 7776 ("The term 'substantial burden' as used in this Act is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise"). Chicago cites a decision of this Court which held that, within the meaning of RFRA, a substantial burden on religious exercise "is one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs." *Mack v. O'Leary*, 80 F.3d 1175, 1179 (7th Cir.1996) (vacated on other grounds). Substituting RLUIPA's broader definition of religious exercise, which need not be "compelled by or central to" a particular religion, for that articulated in *Mack*, the meaning of "substantial burden on religious exercise" could be read to include the effect of any regulation that "inhibits or constrains the use, building, or conversion of real property for the purpose of religious exercise." Such a construction might lend support to Appellants' contention that the CZO, insofar as it contributes to other existing constraints upon the use of specific parcels as churches, substantially burdens religious exercise. However, this cannot be the correct construction of "substantial burden on religious exercise" under RLUIPA. Application of the substantial burden provision to a regulation inhibiting or constraining *any* religious exercise, including the use of property for religious purposes, would render meaningless the word "substantial," because the slightest obstacle to religious exercise incidental to the regulation of land use—however minor the burden it were to impose—could then constitute a burden sufficient to trigger RLUIPA's requirement that the regulation advance a compelling governmental interest by the least restrictive means. We

therefore hold that, in the context of RLUIPA's broad definition of religious exercise, a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impracticable.

Appellants contend that the scarcity of affordable land available for development in R zones, along with the costs, procedural requirements, and inherent political aspects of the Special Use, Map Amendment, and Planned Development approval processes, impose precisely such a substantial burden. However, we find that these conditions—which are incidental to any high-density urban land use—do not amount to a substantial burden on religious exercise. While they may contribute to the ordinary difficulties associated with location (by any person or entity, religious or nonreligious) in a large city, they do not render impracticable the use of real property in Chicago for religious exercise, much less discourage churches from locating or attempting to locate in Chicago. *See, e.g., Love Church v. City of Evanston*, 896 F.2d 1082, 1086 (7th Cir.1990) ("Whatever specific difficulties [plaintiff church] claims to have encountered, they are the same ones that face all [land users]. The harsh reality of the marketplace sometimes dictates that certain facilities are not available to those who desire them"). Significantly, each of the five individual plaintiff churches has successfully located within Chicago's city limits. That they expended considerable time and money so to do does not entitle them to relief under RLUIPA's substantial burden provision. *See, e.g., Stuart Circle Parish v. Board of Zoning Appeals of Richmond*, 946 F.Supp. 1225, 1237 (E.D.Va.1996) ("It is well established that there is no substantial burden placed on an individual's free exercise of religion where a law or policy merely 'operates so as to make the practice of [the individual's] religious beliefs more expensive.'") (quoting *Braunfeld v.*

Brown, 366 U.S. 599, 605, 81 S.Ct. 1144, 6 L.Ed.2d 563, (1961) (plurality opinion)). Otherwise, compliance with RLUIPA would require municipal governments not merely to treat religious land uses on an equal footing with nonreligious land uses, but rather to favor them in the form of an outright exemption from land-use regulations. Unfortunately for Appellants, no such free pass for religious land uses masquerades among the legitimate protections RLUIPA affords to religious exercise.

Though the substantial burden and nondiscrimination provisions are operatively independent of one another, RLUIPA's governmental discretion provision, 42 U.S.C. § 2000cc-3(e), upon which the district court relied in order to find that the February 2000 CZO amendments corrected any violation of the substantial burden provision, appears not to reflect this distinction. That subsection provides, in part, that "a government may avoid the preemptive force of *any provision* of [RLUIPA] by changing the policy or practice *that results in a substantial burden* on religious exercise." 42 U.S.C. § 2000cc-3(e) (emphasis added). Rather than remove any substantial burden on religious exercise, however, the February 2000 amendments simply place churches on an equal footing with nonreligious assembly uses, thereby correcting any potential violation of the nondiscrimination provision. Despite subsection 2000cc-3(e)'s reference to removal of a "substantial burden," we read it to afford a government the discretion to take corrective action to eliminate a nondiscrimination provision violation, whether or not it was the result of a substantial burden on religious exercise. Thus do we find that, under RLUIPA's governmental discretion provision, the February 2000 amendments to the CZO render RLUIPA's nondiscrimination provision inapplicable to this case.[6]

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[6] Appellants also challenge the district court's ruling that their claims under the pre-2000 CZO are moot. They claim that churches, like other

Insofar as Appellants cannot demonstrate on these facts that the CZO substantially burdens religious exercise, and because the February 2000 Amendments to the CZO bring it into compliance with RLUIPA's nondiscrimination provision, Appellants fail to make a sufficient showing on essential elements of their RLUIPA claims. Chicago is therefore entitled to summary judgment on those claims.

Having found RLUIPA inapplicable to the facts of this case, we need not address the issue of RLUIPA's constitutionality, raised by the parties as well as the United States of America, as Intervenor, and various Amici Curiae.

II. Constitutionality of the Chicago Zoning Ordinance

Under the Free Exercise Clause of First Amendment of the United States Constitution, made applicable to state and local governments by the Fourteenth Amendment, no law may prohibit the free exercise of religion. Prior to RLUIPA's enactment, two Supreme Court decisions held that no Free Exercise Clause violation results where a burden on religious exercise is the incidental effect of a neutral, generally applicable, and otherwise valid regulation, in which case such regulation need not be justified by a compelling governmental interest. *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595,

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nonreligious assembly uses, should have been permitted uses in all zones, in which case plaintiff churches would not have been subject to Special Use approval procedures. They allege damages resulting from the costs associated with these procedures. This argument ignores the fact that the primary effect of the 2000 amendments was to impose similar restrictions on non-religious assembly uses, rather than to relax restrictions on churches. Appellants cannot demonstrate that the amended CZO recognizes any preexisting right of churches to operate in B, Z, or M zones. The amendments simply place restrictions on nonreligious assembly uses that are similar to or greater than those facing religious uses. As such, the district court correctly concluded that Appellant's pre-2000 CZO claims are moot.

108 L.Ed.2d 876 (1990); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). Appellants cite *Smith* and *Hialeah* as additional authority for application of the compelling governmental interest and least restrictive means tests to the CZO, not unlike those urged under RLUIPA.

Appellants first argue that the CZO lacks facial neutrality because, like the law at issue in *Hialeah,* the CZO "refers to a religious practice"—use of property as a church—"without a secular meaning discernable from the language or context." 508 U.S. at 530, 113 S.Ct. 2217. In that case, the City of Hialeah reacted to the intention of practitioners of the Santería religion to establish a church within city limits by passing ordinances banning public ritual sacrifice, a distinguishing element of the Santería religious tradition. The Court explained that a law is not neutral if its object "is to infringe upon or restrict practices because of their religious motivation," and then found that the *Hialeah* ordinances' use of the words "sacrifice" and "ritual", which have "strong religious connotations," was evidence of their purposeful targeting of Santería practices. Appellants assert by analogy that the CZO's explicit inclusion of "church" among the various land uses it regulates indicates that it discriminates against churches on its face. Unlike the *Hialeah* ordinances, however, the text of the CZO includes "church" as just one among many and varied religious and nonreligious regulated uses.[7] More importantly, nothing in the record suggests, nor

[7] The variety of regulated uses specifically referenced in the text of the CZO can be gleaned from the following non-exhaustive list of examples: dwellings, nurseries, rectories, parish houses, golf courses, libraries, convents, monasteries, schools, parks, playgrounds, day care centers, hospitals, clubs, lodges, restaurants, wireless communications facilities, cemeteries, parking lots, hotels, photography studios, pet shops, fraternity houses, museums, correctional institutions, tattoo parlors, pawn shops, taverns, kiddie parks, inter-track wagering facilities, earth station

do Appellants articulate in anything but conclusory terms, that the object and purpose of the CZO are anything other than those expressly stated therein. *See* 17 MUN. CODE CHI. § 2.

In addition to their facial challenge under the Free Exercise Clause as interpreted in *Hialeah,* Appellants allege that the CZO was not neutrally applied to His Word during the course of Alderman Huels' successful efforts to initiate the rezoning of 1616 West Pershing Road.[8] While they concede that Alderman Huels may not be held personally liable for his actions based on our decision in *Biblia Abierta,* 129 F.3d at 901-02, Appellants argue that his actions were legislative acts which improperly targeted His Word. However,

> [m]unicipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered. The fact that a particular official—even a policymaking official—has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion.

Pembaur v. Cincinnati, 475 U.S. 469, 481-82, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986). Here, the possibility that Alderman Huels' motives for wanting to have the property rezoned were illicit in no way demonstrates that the City Council and the Mayor, who have final authority under state law to enact city ordinances, *see* 65 I.L.C.S. §§ 5/1-2-1(2),

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antennas, frozen food lockers, live bait stores, banks, barbershops, and paint pellet arenas.

[8] In a single sentence, Appellants also allege due process and equal protection violations as a result of the rezoning of 1616 West Pershing Road. Though it is difficult even to evaluate claims offered in terms as conclusory as these, we find them meritless for the same reasons that we are unmoved by Appellants' Free Exercise claims.

endorsed any such motives. Absent some evidence that the policy-making body, in this case the City Council, approved both the rezoning *and* the illicit motivation therefor—and Appellants offer none—Chicago cannot be held liable for Alderman Huels' actions. *See, e.g.*, *City of St. Louis v. Praprotnik*, 485 U.S. 112, 128-30, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988) (plurality opinion); *id.* at 140-42, 108 S.Ct. 915 (Brennan, J., concurring in the judgment).

Appellants also contend that the CZO is not generally applicable, in that the Special Use, Map Amendment, and Planned Development processes create discretionary, individualized exemptions to the CZO which are then impermissibly withheld from churches. As support for this proposition, they cite the Supreme Court's pronouncement that "[i]n circumstances in which individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of "religious hardship" without compelling reason.'" *Hialeah*, 508 U.S. at 537, 113 S.Ct. 2217 (*quoting Smith*, 494 U.S. at 884, 110 S.Ct. 1595 (citation omitted)). Even assuming, *arguendo*, that the burdens incidental to churches seeking Special Use, Map Amendment, or Planned Development approval amount to "religious hardship" within the meaning of the Court's decision in *Hialeah*, Appellants appear to confuse exemption from a particular zoning provision (in the form of Special Use, Map Amendment, or Planned Development approval) with exemption from the procedural *system* by which such approval may be sought. Under the CZO, these alternate avenues of zoning approval are not merely *available* to any would-be applicant, as *Hialeah* requires. They are mandatory. In short, no person, nor any nonconforming land use, is exempt from the procedural system in place for Special Use, Map Amendment, or Planned Development approval specifically, or the CZO generally. Furthermore, the experiences of plaintiff churches Christ Center and Christian Bible, each of which was initially denied—and subsequently granted—

Special Use approval, demonstrates that Chicago has extended Special Use exemptions to churches. It is clear to this Court that it is neither the policy nor the practice of Chicago to refuse to extend to churches its system of individualized exemptions and, thus, that the CZO is a generally applicable system of land-use regulation.

In *Smith,* the Supreme Court noted that, in cases implicating the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and freedom of association, the First Amendment may subject the application to religiously motivated action of a neutral, generally applicable law to a heightened level of scrutiny. *Smith*, 494 U.S. at 881-82, 110 S.Ct. 1595. Seizing upon this principle, Appellants maintain that their Free Exercise claim involves hybrid rights of free exercise, freedom of speech, freedom of assembly, and equal protection, such that Chicago must justify the CZO's incidental burdens on church location with a compelling state interest. Based on the analyses of Appellants' speech, assembly, and equal protection claims that follow, however, we find them individually lacking the merit necessary to withstand summary judgment. We agree with the Court of Appeals for the Ninth Circuit that "a plaintiff does not allege a hybrid rights claim entitled to strict scrutiny analysis merely by combining a free exercise claim with an utterly meritless claim of the violation of another alleged fundamental right." *Miller v. Reed*, 176 F.3d 1202, 1207-08 (9th Cir.1999). *Accord, e.g., Swanson v. Guthrie Independent School District*, 135 F.3d 694, 700 (10th Cir.1998); *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525, 539 (1st Cir.1995); *Kissinger v. Board of Trustees*, 5 F.3d 177, 180 (6th Cir.1993). Appellants have identified no constitutionally protected interest upon which the CZO infringes, as they must in order to establish a hybrid rights claim requiring heightened scrutiny.

Of Appellants' remaining constitutional claims, the first alleges that the CZO violates Appellants' First Amendment rights to freedom of speech and freedom of assembly because the CZO is neither (i) content neutral nor (ii) narrowly tailored to serve a legitimate governmental objective and (iii) does not leave open ample channels of alternative communication. *See Ward v. Rock Against Racism*, 491 U.S. 781, 782, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (articulating these three criteria for valid time, place, and manner restrictions on speech and assembly). Appellants state in conclusory terms that the CZO discriminates against religious uses, is "irrational and arbitrary," restricts churches to R zones, and is not narrowly tailored. They also state that the CZO's requirement that churches occupying more than two acres obtain Planned Development approval creates a practical ban on large churches. As discussed previously, the CZO is neutral and generally applicable and places churches on a footing equal with, if not superior to, that of nonreligious assembly uses. Similarly, to the extent that the CZO incidentally regulates speech or assembly within churches, such regulation is motivated not by any disagreement that Chicago might have with the message conveyed by church speech or assembly, but rather by such legitimate, practical considerations as the promotion of harmonious and efficient land use. In this respect it is content neutral. In order to satisfy the requirement that it is narrowly tailored, "a regulation need not be the least restrictive or least intrusive means." *Ward*, 491 U.S. at 798, 109 S.Ct. 2746. It need only further "a substantial government interest that would be achieved less effectively absent the regulation." *Id.* at 799, 109 S.Ct. 2746. There is no question that Chicago—like any population center—has a substantial interest in regulating the use of its land and that the CZO promotes that interest. We are also unpersuaded by Appellants' implicit suggestion that the restriction of church use as of right to R zones leaves churches with insufficient channels of communication. Not

only may churches freely disseminate religious speech in a majority of Chicago land zoned for development, but they may also disseminate—and, in the cases of plaintiffs Christ Center and Christian Bible, have in fact disseminated—religious speech in B and various C districts with Special Use approval. Similarly, the Planned Development approval process provides larger churches with ample opportunity to locate within Chicago in a manner consistent with the CZO's legitimate, stated purposes. For these reasons, Appellants' First Amendment freedom of speech and freedom of assembly claims are without merit.

Appellants further argue that the CZO violates the Equal Protection Clause of the Fourteenth Amendment—which provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws"—by treating churches in a manner less favorable than that of nonreligious assembly uses. It is the well established law of this Circuit that, "[a]bsent a fundamental right or a suspect class, to demonstrate a viable equal protection claim in the land use context, a plaintiff must demonstrate governmental action wholly impossible to relate to legitimate governmental objectives." *Forseth v. Village of Sussex*, 199 F.3d 363, 370-71 (7th Cir.2000); *see also City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (unless a statute classifies by race, alienage, or national origin or impinges on fundamental constitutional rights, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest"). Appellants urge us to elevate the level of scrutiny under which we review their equal protection claim against the CZO because the regulation of a church's use of land necessarily implicates the fundamental right of freedom of religious exercise. As a preliminary matter, we are quick to reiterate our earlier determination that any burdens on religious exercise imposed by the CZO are both incidental

and insubstantial. Furthermore, this court has held that the fundamental rights theory of heightened equal protection scrutiny applies only to laws that effect "grave interference with important religious tenets or . . . affirmatively compel [congregants] to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Griffin High School v. Illinois High School Athletic Assoc.*, 822 F.2d 671, 674 (7th Cir.1987). Whatever the obstacles that the CZO might present to a church's ability to locate on a specific plot of Chicago land, they in no way regulate the right, let alone interfere with the ability, of an individual to adhere to the central tenets of his religious beliefs. As the district court adroitly noted, the CZO's limitations on church location are "not the regulation of belief, any more than regulating the location of the *Chicago Tribune* building is the regulation of the newspaper's [F]irst [A]mendment-protected product." *Civil Liberties for Urban Believers*, 157 F.Supp.2d at 908.

Viewed through the lens of the *Cleburne* and *Forseth* rational basis analyses, Chicago's system of land-use regulation satisfies the requirements of the Equal Protection Clause. In general, a zoning ordinance imposing "restrictions in respect of the use and occupation of private lands in urban communities" such as the "segregation of residential, business, and industrial buildings" satisfies the rational basis test as "a valid exercise of authority." *Village of Euclid v. Ambler Realty Company*, 272 U.S. 365, 386-87, 394, 397, 47 S.Ct. 114, 71 L.Ed. 303 (1926). Here, Chicago permits churches to locate in R districts as of right, while requiring Special Use approval in B and most C districts, not only to promote the general public welfare and to protect the character, stability, order, and efficient development of Chicago's varied areas, but also to prevent overcrowding, to limit street congestion, and to conserve the taxable value of city land. 17 MUN. CODE CHI. § 2. Moreover, the CZO makes available avenues by which exceptions for nonconforming uses may be sought (and has made such exceptions in the cases of two

plaintiff churches who applied for Special Use approval). Though the end result of this zoning scheme may be to afford churches better opportunities for location in R districts than B, C, or M districts, under the amended CZO churches still fare better than many other nonreligious assembly uses that are treated equally in B, C, and M districts but excluded from R districts. To the extent that the CZO treats churches any differently from nonreligious assembly uses, it does not disfavor churches. More importantly, any such difference is rationally related to Chicago's legitimate interest in regulating land use within its city limits. The CZO thus complies with the requirements of the Equal Protection Clause.

Finally, Appellants challenge the district court's analysis of their Fourteenth Amendment procedural due process claim.[9] Specifically, Appellants suggest that the district court's characterization of their claim against the Special Use approval procedures as one involving property rights, rather than any particular use or fundamental activity, is at odds with an earlier district court finding that Appellants' due process claim "asserted a fundamental liberty interest in their free exercise of religion, freedom of speech, and freedom of assembly." *See Civil Liberties for Urban Believers v. Chicago*, 1997 WL 94731, No. 94 C 6151 (N.D.Ill. Feb. 28, 1997) (memorandum opinion and order denying Chicago's motion to dismiss multiple claims). Appellants disregard the fact that this language comes from an order denying Chicago's motion to dismiss Appellants' due process claims pursuant to Rule 12(b)(6) of the FRCP. At the summary judgment stage, the district court's finding that a claim is properly stated for Rule 12(b)(6) purposes has no effect on its determination of the merits of that claim. Viewing the facts in a light most favorable to Appellants, the district court properly determined that, because Appellants challenged the

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[9] "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

alleged vagueness of the zoning procedures and standards in a manner that any property owner might so do irrespective of a particular property use or fundamental liberty, the claim focused on property rights rather than Appellants' right to worship. The district court then relied upon *River Park v. City of Highland Park*, 23 F.3d 164 (7th Cir.1994), to determine that any facial due process attack on the CZO must be made in state court. As we stated in that case, in which a plaintiff corporation alleged that Highland Park's politically motivated refusal to act on its zoning application bankrupted the corporation and deprived it of procedural due process,

> Federal courts are not boards of zoning appeals [and] the procedures "due" in zoning cases are minimal. Cities may elect to make zoning decisions through the political process. . . . Highland Park made a political decision in a political fashion, employing procedural maneuvers that prevented the question from reaching the floor for a vote. . . . [Plaintiff] may not have received the process Illinois directs its municipalities to provide, but the Constitution does not require state and local governments to adhere to their procedural promises. Failure to implement state law violates that state law, not the Constitution; the remedy lies in state court.

River Park, 23 F.3d at 165-67 (citations omitted). Here, too, the CZO and its special approval procedures provide Appellants with all the legislative process that is due. Moreover, as the district court noted, the CZO expressly provides for the review of zoning decisions by the Illinois Circuit Courts. *See* 17 MUN. CODE CHI. § 11.3-4; 65 I.L.C.S. § 5/11-13; 735 I.L.C.S. 5/3-104. As such, Appellants cannot prevail on their due process claim.

CONCLUSION

Drawing all factual inferences in Appellants' favor, we nonetheless conclude that their statutory and constitutional claims challenging the Chicago Zoning Ordinance are

without merit. We therefore AFFIRM the district court's order granting the City of Chicago's motion for summary judgment.

POSNER, Circuit Judge, dissenting.

This is a difficult case, but I have come to the conclusion that the restrictions that Chicago's zoning ordinance places on churches (a term that I use broadly to include any religion's place of worship) violate the equal protection clause of the Fourteenth Amendment. I do not address the other grounds on which the plaintiffs attack the restrictions. The discussion of those grounds occupies most of the majority opinion, which devotes little space to what seems to me to be the strongest ground of the appeal.

The ordinance creates three zones so far as relates to the equal protection issue. (I am using the term "zones" functionally rather than to designate categories in the zoning ordinance, which, as is apparent from the majority opinion, is extremely complicated.) The first "zone" is residential. Churches can locate there without having to obtain a permit from the zoning board, as can a number of other nonresidential entities, such as clubs, restaurants, schools, libraries, and drugstores, though restaurants and drugstores only in high-rise apartment buildings. Other nonresidential land uses in the residential zone, either require a permit or are banned outright. The second zone, which I shall call "commercial," is for business and other commercial uses, including not only office buildings and retail stores but also wholesale outlets, warehouses, and light manufacturing, but excluding certain transportation facilities and heavy manufacturing. In the commercial zone, churches require a permit. Last is a zone reserved for transportation facilities and heavy manufacturing, which I shall call the "manufacturing" zone. In it churches are flatly forbidden, although bars, restaurants, and union lodges are freely permitted.

The question is whether the City's restrictions on where churches may locate are rational. But "rationality" in the law of equal protection is not in fact a single standard, though the courts have been coy about admitting this. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985), like this a zoning case, and decisions following it such as *Congregation Kol Ami v. Abington Township*, 309 F.3d 120, 133-44 (3d Cir.2002), and *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 471-72 (8th Cir.1991), identify a category of sensitive uses or activities, where judges are to be more alert for unjustifiable discrimination than in the usual case in which government regulations are challenged on equal protection grounds. See *Lawrence v. Texas*,—U.S.—,123 S.Ct. 2472, 2484-85, 156 L.Ed.2d 508 (2003) (O'Connor, J., concurring); cf. *Plyler v. Doe*, 457 U.S. 202, 224-30, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). It is true that *Cleburne* refused to deem mental retardation a "quasi-suspect classification" warranting a standard of review more searching than that of rationality, see *City of Cleburne v. Cleburne Living Center, Inc.*, *supra*, 473 U.S. at 442-46, 105 S.Ct. 3249 and on this basis the City of Chicago in our case cites the decision in support of its position. But one has only to read a little further in the *Cleburne* opinion to realize that the Court was not treating the zoning discrimination at issue there as it would have treated a discrimination in the taxation of railroads or the zoning of bowling alleys. Compare *Fitzgerald v. Racing Ass'n of Central Iowa*,—U.S.—,123 S.Ct. 2156, 2159-61, 156 L.Ed.2d 97 (2003). The ordinance challenged in *Cleburne* required a permit (which was denied) for a home for mentally retarded people in a zone in which hospitals and nursing homes, along with private houses and a variety of other residential facilities, were allowed without permit. The mentally retarded arouse distaste and even fear among many people, but the Court said that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a

zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like." *City of Cleburne v. Cleburne Living Center, Inc.*, *supra*, 473 U.S. at 448, 105 S.Ct. 3249. The Court went through the other justifications that Cleburne had offered for the discrimination, found them wanting, and invalidated the ordinance.

The majority opinion in *Cleburne* is deficient in candor. Cf. Dennis J. Hutchinson, "More Substantive Equal Protection? A Note on Plyler v. Doe," 1982 *Supreme Court Review* 167, 168, 179, 194. As a separate opinion joined by three of the Justices pointed out, "The Court holds the ordinance invalid on rational-basis grounds and disclaims that anything special, in the form of heightened scrutiny, is taking place. Yet Cleburne's ordinance surely would be valid under the traditional rational-basis test applicable to economic and commercial regulation. In my view, it is important to articulate, as the Court does not, the facts and principles that justify subjecting this zoning ordinance to the searching review—the heightened scrutiny—that actually leads to its invalidation. . . . [T]he Court does not label its handiwork heightened scrutiny, and perhaps the method employed must hereafter be called 'second order' rational-basis review rather than 'heightened scrutiny.' But however labeled, the rational-basis test invoked today is most assuredly not the rational-basis test of *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955), *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959), and their progeny." *City of Cleburne v. Cleburne Living Center, Inc.*, *supra*, 473 U.S. at 456, 458, 105 S.Ct. 3249.

We should follow what the Supreme Court does and not just what it says it is doing. The Court rejects a "sliding scale" approach to equal protection in words but occasionally accepts it in deeds. *Cleburne* instantiates though it does not

articulate the proposition that discrimination against sensitive uses is to be given more careful, realistic, skeptical scrutiny by the courts than discrimination against purely commercial activities. *Romer v. Evans*, 517 U.S. 620, 634-35, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996); cf. *Lawrence v. Texas*, *supra*, 123 S.Ct. at 2482. And while it is true that the Court has rejected the proposition that "*Cleburne* stands for the broad proposition that state decisionmaking reflecting 'negative attitudes' or 'fear' necessarily runs afoul of the Fourteenth Amendment," adding that "although such biases may often accompany irrational (and therefore unconstitutional) discrimination, their presence alone does not a constitutional violation make," *University of Alabama v. Garrett*, 531 U.S. 356, 367, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001), we should give due weight to "necessarily" and "alone." Previous decisions of this court and other courts of appeals have recognized that the *Cleburne* line of cases expands the boundaries of "rationality" review. See *Milner v. Apfel*, 148 F.3d 812, 816-17 (7th Cir.1998); *Pontarelli Limousine, Inc. v. City of Chicago*, 929 F.2d 339, 341-42 (7th Cir.1991); *Ramos v. Town of Vernon*, 331 F.3d 315, 320 (2d Cir.2003); *Able v. United States*, 155 F.3d 628, 634 (2d Cir.1998).

Churches are no less sensitive a land use than homes for the mentally retarded, as both *Congregation Kol Ami v. Abington Township, supra*, and *Cornerstone Bible Church v. City of Hastings, supra*, recognize, though the reason is different. The mentally retarded are victims of irrational fears and cruel scorn; they are shunned. Religious people are not shunned, but religion arouses strong emotions, sectarian rivalry is intense and often bitter, and the mixing of religion and government is explosive. When government singles out churches for special regulation, as it does in the Chicago ordinance, the risk of discrimination, not against religion as such—Chicago is not dominated by atheists—but against particular sects, is great enough to require more careful

judicial scrutiny than in the ordinary equal protection challenge to zoning.

Chicago's ordinance discriminates in favor of well-established sects. Not only did they acquire the land on which their churches are built in residential areas when such land was relatively cheap and abundant, and therefore affordable by noncommercial entities, such as churches (and there are of course some wealthy churches); in addition, because nonconforming uses are grandfathered, the churches that have managed to get permission to build over the years in nonresidential zones are untouchable. But what of new, small, or impecunious churches, such as the 40 to 50 obscure sects, one of which has only 15 members, that compose the principal plaintiff, Civil Liberties for Urban Believers? And obscure they are. It is telling that of the six other named plaintiffs—Christ Center (150 members), Christian Covenant Outreach Church (ministering to teenagers and former gang members), His Word Ministries to All Nations, Christian Bible Center (35 members), Church on the "Way" Praise Center, and Monte de Sion Church—only one (Christian Bible Center) is on the city's list of area churches. See http://www.thecityofchicago.org/church/.

As David Hume would have predicted, the greater vitality of American religion than of religion in countries in which there is an established church or churches owes much to our unwillingness to allow government to favor particular sects. Laurence R. Iannaccone, Roger Finke & Rodney Stark, "Deregulating Religion: The Economics of Church and State," 35 *Econ. Inquiry* 350 (1997); Iannaccone, "The Consequences of Religious Market Regulation: Adam Smith and the Economics of Religion," 3 *Rationality & Soc'y* 156 (1991). By impairing religious competition, such favoritism turns many people—those not comfortable with the creed or clergy or congregants of the favored church—off religion.

Religious competition presupposes free entry into the religious "marketplace." A new church is unlikely, however, to have the resources necessary for building its place of worship in a residential area other than a slum, especially as the Chicago ordinance requires that the church provide parking, which will mean that unless its building is tiny it will have to acquire more than one city lot. A church that wants to build in the commercial zone, where land is cheaper, must obtain a special permit; and if it wants to build in the manufacturing zone, it is out of luck unless it can procure an amendment to the zoning ordinance. At issue in *Congregation Kol Ami v. Abington Township* was a zoning ordinance that *excluded* churches from residential areas; this is some evidence that the City is wrong to suppose that it is any longer the case that churches fit better into residential than nonresidential areas. The phenomenon of the "storefront church"—an apt description of the churches in this case—reflects both the inability of a new, small church to afford to build in a residential area and the fact that a new church needs to advertise its presence, which it can do at little cost just by being located in a commercial area, where there are more passersby than in a residential area.

> Small storefront or house churches can be found in many places in the city. A recent article by George Gallup reports that 40% of all American adults meet in small religious groups. Not surprisingly, a large number of these groups are in fact storefront or house churches which revolve around Bible study, prayer, and Sunday school.
>
> This is not happening in just a Christian context. Within the New Age movement, Muslim, Hindu, and even Jewish traditions, small groups are gathering in storefront meeting houses. These storefront worship spaces will continue to grow for many reasons, but the one that will affect them even more than group dynamics

> is city planning. As tighter zoning laws are pass[ed] in Boston and real estate prices continue to sky-rocket, the only place for churches to turn to are existing commercial spaces.

Robert L. Lewis, Jr., "Ministry Research Project: Storefront Churches of Boston; A Photographic Study of Selected Storefront and Home Churches in the City of Boston," http://www.bu.edu/ccrd/research/completed/storefront.html. The article is about Boston but the analysis in it is equally applicable to Chicago.

Granted, Chicago's prohibition against locating a church in the commercial zone is not absolute. A permit can be sought. But obtaining one is costly for a marginal enterprise; the zoning board enjoys broad discretion in deciding whether to grant or deny a permit; and a public hearing is required at which opposition to the church's application for a permit is predictable because churches do not enhance commercial activity (see Lucinda Harper, "Storefront Churches: The Neighbors Upscale Stores Don't Love," *Wall St. J.*, Mar. 15, 2000, at B1)—this is one of the reasons the City offers in defense of the ordinance. It is a bad reason, but it is the kind of reason likely to impress the zoning authorities.

It is a bad reason because while it is true that a church is less likely to enhance a commercial area than a Bloomingdale's or a Four Seasons is, there are very few blocks in Chicago that are purely commercial. A combination of grandfathering, the grant of special permits, and changes in zoning law has produced a crazy quilt of land uses. On Michigan Avenue near our courthouse—an area zoned commercial as I have been using the term—retail stores, restaurants, hotels, colleges, office buildings, and clubs jostle cheek by jowl. If one of the clubs or colleges were replaced by a church, the commercial life of Michigan Avenue would not be affected, although the "tone" of the avenue might be lowered by a *storefront* church. (As a matter of fact, there *is* a

church on Michigan Avenue—the Fourth Presbyterian Church. See http://www.fourthchurch.org/.) For remember those "negative attitudes" of which the Court spoke in *Cleburne?* Not only are mainline churches apt to be hostile to upstarts such as the members of Civil Liberties for Urban Believers, and particularly to storefront churches, but even people who are not caught up in sectarian rivalries might consider the presence of a church rather a downer in a "fast" district, such as Old Town. Indeed, a permit for one of CLUB's members was denied because it was thought that the presence of a church would impede the transformation of the area into a "nightclub district."

The City's brief offers the further, but absurdly paternalistic, argument that it is bad for the churches themselves to be located in commercial or industrial areas, because of noise and commotion. Obviously that is a judgment for the church to make rather than government, by trading off the cost to the church of noisy and profane surroundings against the benefits in lower costs of land acquisition and proximity to sinners, including prostitutes, drug addicts, and gang members, whose souls are particularly in need of saving. At oral argument the City's lawyer pressed another point, that the mysterious exclusion of churches from the manufacturing zone is justified by the fact that if they clustered there they might try to expel the factories by bringing a nuisance suit. Because Illinois rejects the doctrine of "coming to the nuisance," *City of Pana v. Central Washed Coal Co.*, 260 Ill. 111, 102 N.E. 992, 998 (1913); *Oehler v. Levy*, 234 Ill. 595, 85 N.E. 271, 273-74 (1908); see also *Wheat v. Freeman Coal Mining Corp.*, 23 Ill.App.3d 14, 319 N.E.2d 290, 294 (1974), it is not a defense to a nuisance suit that the nuisance was there before the plaintiff. The lawyer's vision of churches concentrating in the manufacturing zone and then bringing a nuisance suit to transform it into—what, a religious zone?—is fanciful. But even if it were realistic, the City, which is a part of Illinois state government from the

standpoint of the application of the equal protection clause, cannot defend discrimination by arguing that it is coerced by state law. Otherwise a state could pass a law requiring the police to beat up anyone they arrested, and police sued for violating the Fourth Amendment for using excessive force in effecting seizures of the person would have a defense, which no one believes. The state can untie the City's hands by authorizing a "coming to the nuisance" defense, either generally or just for the benefit of manufacturers whose factories are in cities. Anyway a nuisance suit would not succeed unless the plaintiff could show a net increase in land values from abating the nuisance; and if so this would imply that the City was better off for the suit.

The City's final argument is that the zoning ordinance represents a "global bargain" whereby churches get preferred treatment in the residential zone and secular uses get preferred treatment in the commercial zone. If one assumes, as I would, that the exclusion of commercial uses from the residential zone is rational (deny that, and one condemns virtually all zoning as irrational), the exclusion of churches from the commercial zone would be rational if their presence would crowd out commercial users. But that is an absurd suggestion. A slightly more realistic worry would be that if churches are allowed to bid for land zoned commercial, the price of such land will rise, to the detriment of commercial users of it, because the amount of land is fixed and the demand would have increased. But the aggregate demand of churches for land zoned commercial is too slight in relation to the amount of that land for allowing them to bid on it to affect the price noticeably.

Thus far I have been discussing the ordinance as it was amended in 2000 in virtual acknowledgment that its predecessor was in violation of the Constitution. For the predecessor ordinance allowed fraternal lodges and other clubs, community centers, and other meeting places to locate

in the commercial zone without obtaining a permit. (The amendment eliminated this privilege, though colleges, union lodges, libraries, and funeral homes, along with the conventional business and commercial establishments, retain it.) The only difference between them and churches is that they are secular. There is no difference so far as the use of land is concerned. The "global bargain" defense is particularly questionable as applied to the old ordinance. A church is no more or less suitable for the residential zone than a fraternal lodge and a fraternal lodge no more or less suitable for the commercial zone than a church. The old ordinance discriminated arbitrarily in favor of churches in the residential zone and against them in the commercial zone, thus distorting religious competition in favor of existing and against new churches. The new ordinance retains one completely unreasonable distinction, that between union lodges and churches, putting one in mind of the Spanish Civil War, a struggle between syndicalism and clericalism. The distinction between churches on the one hand and libraries and colleges on the other hand, another distinction retained by the amended ordinance, is only a little more rational.

The plaintiffs filed their suit almost a decade ago, before the ordinance was amended. The amendment did not moot their challenge to the old ordinance because they seek damages for the delay they encountered in obtaining permission to build in desirable locations. If as I contend the requirement of a permit was unconstitutional because it discriminated in favor of fraternal lodges, then the delay the plaintiffs encountered in finding suitable quarters was the consequence of a constitutional violation and the plaintiffs are entitled to damages. As an example of the runarounds that the plaintiffs experienced in obtaining a special permit in the commercial zone, consider the hegira of the Christian Bible Church. From small beginnings (like Christianity itself), meeting in a private home, the congregation in 1988 began meeting in a funeral parlor, hardly an auspicious site. In 1990

it found a suitable building in the commercial zone, but did not apply for a permit after being told that the alderman for the ward in which the building was located would not allow a church at that location. The following year Christian Bible bought a building in another part of the commercial zone, applied for a permit, and was turned down. After trying without success to sell the building, the church renovated it, and while the building was closed for renovations the congregation met in rented quarters or private homes. The renovations completed, Christian Bible applied for and this time received a permit to use the building as its church. By now it was 1993; it had taken three years to find suitable space. As Christian Bible has only 35 members, the burden that the ordinance imposed on it was formidable.

Chicago's zoning ordinance imposes the same severe burden on new churches that the ordinance invalidated in the *Cleburne* case imposed on homes for the mentally retarded, and with no greater justification. In doing so it denied the plaintiffs the equal protection of the laws.

APPENDIX B

UNITED STATES DISTRICT COURT,
N.D. ILLINOIS, EASTERN DIVISION

No. 94 C 6151

C.L.U.B. (CIVIL LIBERTIES FOR URBAN BELIEVERS),
CHRIST CENTER, CHRISTIAN COVENANT OUTREACH CHURCH,
CHRISTIAN BIBLE CHURCH, MOUNT ZION CHURCH,
Plaintiffs,

v.

CITY OF CHICAGO,
Defendant.

March 29, 2002

MEMORANDUM AND ORDER

HIBBLER, District J.

The Court has before it Plaintiff's Motion to Alter or Amend the Judgement of this Court. The motion is fully briefed and thus ready for adjudication. For the following reasons, the Court DENIES Plaintiff's Motion to Alter or Amend the Judgment.

The association Civil Liberties for Urban Believers (C.L.U.B.) and some of its member churches ("Plaintiffs") filed suit against the City of Chicago ("Defendant"). Plaintiffs claim Defendant's zoning policy and procedures restricted Plaintiffs' First Amendment rights to the free exercise of religion, freedom of speech and freedom of assembly and

denied equal protection and due process to Plaintiffs. After over seven years of litigation and numerous opinions issues by both the District Court and Circuit Court, this Court granted Defendant's motion for summary judgment and disposed of the case. *C.L.U.B. v. City of Chicago*, 157 F.Supp.2d 903 (N.D.Ill.2001). Plaintiff has submitted the present motion to revisit and challenge the Court's ruling and opinion.[1]

Standard of Review

Rule 59(e) motions for reconsideration serve a limited function. Under Rule 59(e), the moving party must clearly establish: a significant change in the law has occurred; the court misunderstood the party; the court made its decision outside the adversarial issues presented to the court; the court made an error of apprehension, not reasoning; or significant new facts have been discovered. Fed.R.Civ.P. 59(e); *Russell v. Delco Remy Div.*, 51 F.3d 746, 749 (7th Cir.1995) (citing *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir.1990)). In general, motions for reconsideration cannot be used to introduce new theories or rehash old arguments. *Oto v. Metropolitan Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir.2000). "A 'manifest error' is not demonstrated by the disappointment of the losing party. It is the wholesale disregard, misapplication, or failure to recognize controlling precedent." *Id.* (citation omitted).

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[1] In its present motion, Plaintiff addressed the private nature of C.L.U.B.'s membership and mentioned the history of property ownership of one of its churches. This information does not change the Court's analysis and application of the relevant law in the present case.

Analysis

The Pertinence of the Pre-February 2000 Zoning Plan

Plaintiffs argue the Court failed to address their Equal Protection claims as applied to Defendant's pre-February 2000 zoning scheme. However, the Court clearly stated in its order that Plaintiffs' Equal Protection claim is evaluated under a "rational basis" standard. *C.L.U.B.*, 157 F.Supp.2d at 909-912. The pre-Amendment zoning scheme complied as a whole with the Equal Protection Clause of the Fourteenth Amendment because the scheme's elements were supported by reasonable distinctions between churches and the other allegedly similar uses. *Id.* at 912. Thus, to the extent it is relevant to the present discussion, the prior zoning plan was constitutional.

Permitted Uses in Manufacturing Zones

Plaintiffs allege the post-February 2000 zoning scheme continues to exclude churches from light manufacturing districts ("M-1") while allowing community centers as permitted uses in these areas. Defendant has established the February 2000 Chicago City Council amendments ("MA-59"), which revised the City's Zoning Ordinance at issue, changed the legal status of "Municipal and Privately-Owned Recreation Buildings or Community Centers" by removing them as permitted uses in manufacturing districts, including M-1.[2] Thus, under the current zoning scheme, churches are treated no worse than a similarly situated non-religious assembly.

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[2] The Chicago City Council has corrected a previous clerical error in the record to now state unambiguously that MA-59 eliminated recreation buildings and community centers as permitted uses in "M" zones. Since February 2000, Defendant's Zoning Administrator has enforced the amendment as intended and passed, and he corrected the technical oversight.

Religious Land Use and Institutionalized Persons Act § 2(b)(1)

Plaintiffs maintain the Court failed to specifically address their arguments regarding Section 2(b)(1) of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C.A. § 2000cc, et seq.[3] Section 2(b)(1) prohibits Defendant from treating Plaintiffs "on less than equal terms with a nonreligious assembly or institution." As the Court stated in its opinion, the zoning plan does not violate Section 2(b)(1) because Defendant's "zoning scheme must be viewed as a whole, with attention focused as to how the pieces combine to form the complete zoning scheme"; as such, the scheme treats Plaintiffs as well, if not better than similar, non-religious assembly uses. *C.L.U.B.*, 157 F.Supp. 2d at 912. For example, unlike comparable non-religious uses, churches operate in residential ("R") districts as a permitted use and enjoy a unique application process which automatically approves their applications for special use pending for more than 120 days. *See Chicago Zoning Ordinance*, Municipal Code of Chicago, Title 17, Art. 11.10, § 11.10-7.5 (2002).

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[3] The Court clearly stated Section 2(a)(1) of RLUIPA is inapplicable to the present matter due to Section 5(e), which allows a governmental body to avoid heightened scrutiny if the body removes any substantial burden. As the House Committee of the Judiciary stated when it presented RLUIPA as a bill, "Section 5(e) emphasizes that this Act does not require states to pursue any particular public policy or to abandon any policy, but that *each state is free to choose its own means of eliminating substantial burdens on religious exercise.*" H.R.Rep. No. 106-219, at 30 (1999) (emphasis added). Here, Defendant's February 2000 amendments to the Zoning Ordinance adjusted Defendant's policies concerning special use permits and districts to eliminate any alleged burden.

Buckhannon and Claims for Money Damages

The Court granted Plaintiff's motion to submit supplemental authority, *Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources, et al.*, 121 S.Ct. 1835 (2001), in support of the present motion to reconsider. In *Buckhannon*, the Supreme Court stated a court may award statutory attorney fees to the prevailing party who secures a judgment on the merits or court-ordered consent decree; as a result, courts may no longer follow the "catalyst rule," wherein a court may award fees to a plaintiff who secures a voluntary change or cessation in the defendant's conduct. *Id.* at 1838-1843. Plaintiff asserts *Buckhannon* requires the Court to address the constitutionality of Defendant's pre-February 2000 zoning scheme to determine if Plaintiffs are entitled to monetary damages, attorneys fees and costs. *Id.* at 1842-43. However, as stated above and in the Court's earlier opinion, the Court has already determined the pre-February 2000 scheme met all constitutional tests.

Further, Plaintiffs lack standing to seek monetary damages regarding the pre-February 2000 zoning plan. First, Judge Andersen previously determined C.L.U.B. is an association and thus lacks standing to seek monetary damages on behalf of individual churches. *C.L.U.B. v. City of Chicago*, No. 94 C 6151, 1996 WL 89241, at *14 (N.D.Ill.Feb.27, 1996) ("C.L.U.B. may have associational standing to pursue forms of prospective relief which do not require individualized proof but may not pursue money damages."); *see also Retired Chicago Police Ass'n v. City of Chicago*, 76 F.3d 856, 863 (7th Cir.1996); *Sanner v. Board of Trade of City of Chicago*, 62 F.3d 918, 923 (7th Cir.1995); *Irish Lesbian and Gay Org. v. Giuliani*, 143 F.3d 638, 650 n. 5 (2nd Cir.1998).

Second, the remaining individual church Plaintiffs were not injured by the specific provisions of the zoning scheme they have challenged. Their monetary damage claims are founded

upon the fact that, unlike the post-February 2000 scheme, the pre-February 2000 zoning scheme allowed additional non-religious assembly uses in "M" zones; the individual churches maintain they suffered specific monetary injuries as a result of this unconstitutional difference in the previous plan. However, Plaintiffs' alleged injuries cannot be traced to the section of the pre-February 2000 zoning scheme that excluded churches from "M" zones. Rather, Plaintiffs have alleged they were damaged by the scheme's requirement that they obtain special use permits to operate in "B" and "C" districts and not the portion of the old ordinance that excluded churches from "M" zones. The requirement to obtain a special use permit to operate in "B" and "C" zones was not altered by the February 2000 amendments and thus remains in the current scheme; moreover, the Court upheld the special use permit requirements in its March 30 opinion. *C.L.U.B.*, 157 F.Supp.2d at 912.

If the remaining church Plaintiffs' injuries were causally related to the prior "M" classification, then these parties might have claims for money damages regarding the pre-February 2000 zoning scheme. However, Christ Center, Christian Covenant Outreach Church, Christian Bible Center, and Mount Zion Church were not legally injured by the exclusion of churches from "M" zones. Instead, each church has alleged it was injured by the requirement that it obtain a special use permit to operate in "B" and "C" districts.[4] *See* Pls.' Aff., Ex. A-2,3,5,7; Pls. Fourth Am. Compl. Plaintiffs identified properties in "B" and "C" districts in which they were interested and they maintain the permit requirement discouraged them from buying those properties. Plaintiffs

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[4] In his February 1996 motion to dismiss opinion, Judge Andersen held Christ Center and Christian Bible Church had standing to challenge the special use permit requirements. *C.L.U.B.*, 1996 WL 89241, at *12-13. As noted above and in the Court's March 30 summary judgment opinion, the special use permit requirements have been found constitutional.

have merely alleged abstract and conjectural claims of hardship as a result of the pre-February 2000 "M" classifications and have failed to allege that, but for the exclusion of churches from "M" districts, they would have purchased specific properties.[5] *See Love Church v. City of Evanston*, 896 F.2d 1082, 1086 (7th Cir.1990) (court held plaintiff, who alleged it was injured by a town ordinance that required churches to obtain special use permits in all city districts, lacked standing because the church's "speculative claims cannot constitute distinct and palpable injury for purposes of standing."); *see also C.L.U.B.*, 1996 WL 89241, at *8-13. Thus, regarding the pre-February 2000 zoning scheme, C.L.U.B. and the individual Plaintiffs lack standing to allege monetary damage claims.

CONCLUSION

For the above reasons, the Court DENIES Plaintiffs' Motion to Alter or Amend the Judgment of the Court.

IT IS SO ORDERED.

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[5] Christ Center identified property in a M-1 zone and maintains it considered locating there, but the church did not purchase the property or even apply for a permit. (Pl. Aff. Ex. A-2 at ¶ 20.) Such allegations do not establish a "distinct and palpable" injury fairly traceable to Defendant. *Love Church*, 896 F.2d at 1086 (the Seventh Circuit denied standing to the individual churches and stressed the plaintiffs had never even applied for a special use permit).

APPENDIX C

UNITED STATES DISTRICT COURT
N.D. ILLINOIS
EASTERN DIVISION

No. 94CV6151

C.L.U.B.(CIVIL LIBERTIES FOR URBAN BELIEVERS), CHRIST CENTER, CHRISTIAN COVENANT OUTREACH CHURCH, HIS WORD MINISTRIES TO ALL NATIONS, CHRISTIAN BIBLE CHURCH, MONTE DE SION (MOUNT ZION) CHURCH,
Plaintiffs,

v.

CITY OF CHICAGO,
Defendant.

March 30, 2001
As Amended Oct. 17, 2001

MEMORANDUM AND ORDER

HIBBLER, District Judge.

CLUB and a collection of individual churches ("Plaintiffs") and the City of Chicago ("Defendant") filed cross motions for summary judgment; also, the City filed a motion for summary judgment on Count XIV of Plaintiffs' Fourth Amended Complaint, i.e. the Religious Land Use and Institutionalized Persons Act (RLUIPA). The issues have been fully briefed and thus are now ripe for adjudication. For the following reasons, this Court GRANTS Defendant's motion for summary judgment (doc. # 126), DENIES

Plaintiffs' motion for summary judgment (doc.# 128) and GRANTS Defendant's motion for summary judgment on Count XIV of Plaintiffs' fourth amended complaint (doc. # 151).

BACKGROUND

Prior Opinions and Procedural History

On October 11, 1994, Plaintiffs filed their first complaint in this case; on November 9, 2000, Plaintiffs filed their fourth amended complaint, which is currently before this court. Plaintiffs' prior complaints were the subject of five written opinions by Judge Andersen and a published opinion by the Seventh Circuit Court of Appeals, which held Aldermen William Banks and Patrick Huels to be absolutely protected by legislative immunity for their particular actions related to zoning ordinances. *See C.L.U.B. v. City of Chicago*, No. 94 C 6151, 1996 WL 89241 (N.D.Ill. Feb.27, 1996)("*CLUB I*"), *rev'd in part by Biblia Abierta v. Banks*, 129 F.3d 899 (7th Cir.1997); *C.L.U.B. v. City of Chicago*, No. 94 C 6151, 1996 WL 697630 (N.D.Ill. Nov.20, 1996)("*CLUB II*"); *C.L.U.B. v. City of Chicago*, No. 94 C 6151, 1997 WL 43226 (N.D.Ill. Jan.27, 1997)("*CLUB III*"), *rev'd by Biblia Abierta; C.L.U.B. v. City of Chicago*, No. 94 C 6151, 1997 WL 94731 (N.D.Ill. Feb.28, 1997)("*CLUB IV*"); *C.L.U.B. v. City of Chicago*, No. 94 C 6151, 1997 WL 102552 (N.D.Ill. Mar.6, 1997)("*CLUB V*"), *rev'd in part by Biblia Abierta.*

Chicago Zoning Ordinances

The regulation of land uses within the City is set forth as the Zoning Ordinance in Title 17 of the Municipal Code of Chicago. Generally, the City is divided into several broad use districts: Residence ("R"), Business ("B"), Commercial ("C"), or Manufacturing ("M"). Each zone contains various subdistricts (e.g.R1, R2, R3, etc.); the Zoning Ordinance also sets forth the uses allowed within each sub-district. These

zoning categories apply to all property except that zoned as a Planned Development. Approximately 40% of the City is zoned as R districts, with the remaining parts of the City divided into B, C, or M districts.

Within each sub-district, certain uses are allowed as of right ("permitted uses"), while other uses are allowed as "special uses" and require approval from the City's Zoning Board of Appeals ("ZBA") and still other uses are prohibited under any circumstances. The ZBA will consider an application for a special use permit only after a public hearing is noticed and held, and a written report is prepared and filed with the ZBA by the Commissioner of Planning and Development. Art. 11.10-2. In considering whether to grant a special use permit, the ZBA makes an ad hoc determination as to what impact the special use will have on other entities in the district. Art. 11.10-1. A permit will not be granted unless the special use: (1) complies with public convenience; (2) does not threaten public health, safety, and welfare; (3) does not diminish the value of nearby property; (4) complies with Articles 7, 8, and 9 of the Chicago Zoning Ordinance; and, (5) conforms with applicable regulations in the district. Art. 11.10-4. Further, the Commissioner of Planning and Development may recommend, and the ZBA may consider in its discretion, other factors, e.g. off-street parking and loading. Art. 11.10-5. Upon receiving an application, the ZBA often notifies the alderman of the respective ward for which the special use permit application was filed and may consider the input of the alderman on whether a special use permit should be granted for a particular location. Additionally, the ZBA permits neighbors and community groups to testify at its hearings concerning the pending application. The overall cost of obtaining a special use permit ranges from $4,000 to $5,000; moreover, if property is used in violation of the Zoning Ordinance, the City may impose daily fines and issue injunctions.

In particular, the Zoning Ordinance treats churches as follows: (a) within all R districts, churches are permitted uses as of right; (b) within all B districts, churches are special uses, and thus must obtain a permit to locate in these areas; (c) within C1, C2 and C3 districts, churches are also special uses; and (d) within the C4 district and all M districts, churches are not permitted. Art. 7-10. The treatment of churches today within the various districts is largely the same as it was in 1957, the year in which the Zoning Ordinance was last comprehensively amended.

In each of their complaints, Plaintiffs have argued churches require special use permits to locate in B and C districts, while other similar uses may locate in B, C and M districts as permitted uses. In response to this litigation, the City Council recently amended the Zoning Ordinance as to certain uses Plaintiffs maintain are similar to churches. *Chicago City Council Journal of Proceedings*, February 16, 2000, p. 25997-26013. Under the amended ordinance, "clubs and lodges," "meeting halls," and "recreation buildings and community centers" are now required to obtain special use permits to locate in B and C districts, the same as churches. However, unlike churches, none of these allegedly similar uses are permitted uses in all R districts. Further, with respect to only churches, the amendments to the Zoning Ordinance removed the requirement for a special use permit that an applicant affirmatively demonstrate the proposed use is "necessary for the public convenience at that location." *See Employment Div., Dept. of Human Res. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)("[C]ourts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."). Further, the amended ordinance automatically grants a special use permit if the ZBA does not render a decision within 120 days of the date of a church's application.

Factual History[1]

Plaintiff Civil Liberties for Urban Believers ("CLUB") is an unincorporated association of approximately 40 to 50 churches located in Chicago, Illinois and the surrounding suburbs.[2] CLUB challenges zoning laws it maintains restrict the free exercise of religion and other freedoms of its own members. The individual member churches of CLUB are incorporated as Illinois religious or not-for-profit corporations and range in size from 15 to 15,000 members. In the present action, CLUB and five of its individual church members, Christ Center, Christian Covenant Outreach Church ("Christian Covenant"), His Word Ministries to All Nations ("His Word"), Christian Bible Church ("Christian Bible"), and Monte De Sion Church ("Mount Zion"), allege fourteen counts in their Fourth Amended Complaint arising from zoning challenges.

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[1] Throughout the documents he has filed with the court, Plaintiff's counsel continues to include plaintiffs and defendants that have been dismissed. For example, Aldermen Huels and Banks were dismissed as defendants from this case by Judge Andersen on March 18, 1998, in response to the Seventh Circuit's decision in *Biblia Abierta*, and yet Plaintiffs' counsel continues to include them in his captions and in his complaint (e.g. Pl. Compl. at 26-27: Plaintiff's prayer for relief requests $1.3 million from Huels). Similarly, the State of Illinois was dismissed as a defendant by Judge Andersen in *CLUB I*, and yet counsel continues to feature the State. *CLUB I*, 1996 WL 89241, at *17. Plaintiff's counsel displays a lack of preparation and organization and risks wasting the court's time and resources.

[2] While it is unclear who its members are or even the precise number of members, the court in *CLUB I* found "CLUB has associational standing to pursue declaratory and injunctive relief on behalf of its members actually injured." *CLUB I*, 1996 WL 89241, at *15.

Christ Center began meeting in a high school auditorium in 1990, but soon experienced difficulties at this location due to various school functions that interrupted weekly worship. As a result, Christ Center began searching for a building to purchase. The church was unsuccessful in locating an appropriate building in any R districts. In the summer of 1992, Christ Center located a suitable building at 1139-43 West Madison in Chicago. The building was located in a C district and Christ Center promptly applied for a special use permit. After completing the application process, Christ Center reached out to gain the support of neighbors and Alderman Theodore Mazola. Most neighbors favored a taxpaying entity in the neighborhood rather than a church and Alderman Mazola stated that he would support the church's special use permit on any street but Madison. The Zoning Board eventually convened a special hearing on September 18, 1992. On October 18, 1992, the special use permit was denied. Christ Center subsequently found a second building in an M district at 123 South Morgan. The owner of the building also agreed to provide financing. However, the Chicago Department of Planning and Development informed Christ Center that it would oppose any rezoning application because the particular area was designated to become an entertainment area and the presence of a church would inhibit such development. Christ Center subsequently choose not to file an application for rezoning. In the fall of 1993, Christ Center obtained property at 4445 South King Drive, successfully obtained a special use permit and now operates a church at this location. Christ Center now claims that it paid substantial sums in attorneys fees, appraisal fees, zoning application charges, title charges and other expenses attempting to find suitable property.

Between 1986 and the summer of 1988, Christian Bible met in a private home. The church eventually outgrew this space and began meeting in a funeral home. The funeral home, however, proved aesthetically and administratively

problematic. In 1990, Christian Bible located a suitable building in a B district at 83rd and Essex. Alderman Beavers promptly informed Christian Bible that "he would not allow" a church at that location. Consequently, Christian Bible did not apply for a special use permit at this location. In March 1991, Christian Bible purchased property in another B district at 513-23 East 75th Street. The Park Manor Neighbors Association and Alderman Steele both opposed the church's special use permit application. On May 17, 1991, the permit was denied. Christian Bible then unsuccessfully attempted to sell the building for 10 months. In February 1992, Christian Bible renovated the building to enhance its appearance. During these renovations, the church rented space at another location, or held meetings at private homes. Christian Bible later reapplied for a special use permit which was granted on August 20, 1993 with the support of neighbors in the district. Christian Bible now claims the delay in obtaining a special use permit prevented the church from obtaining a real estate tax exemption. The church further alleges that it also paid substantial sums in expenses related to the application process and also suffered a decrease in membership. Christian Bible now owns and meets at a church at 6210 S. St. Louis and has successfully obtained a special use permit to operate the church.

From February, 1988 to December, 1993, Mount Zion rented space in a C district at 4545 North Kedzie. During this period, Mount Zion never applied for a special use permit. In 1990, a City inspector ordered Mount Zion to vacate the building. In April 1993, Mount Zion located suitable rental property at 3949 North Pulaski, and applied for a special use permit. During this process, the Zoning Board informed Mount Zion that the building lacked adequate parking accommodations for a church and both the building and each parking lot would require special use permits. Alderman Wojcik and a neighborhood group also opposed Mount Zion's application. Consequently, Mount Zion withdrew its

application for a special use permit. Mount Zion now owns and meets in a church at 3807 N. Lavergne.

On November 1, 1992, Christian Covenant first rented property in a C district. The owner of the building offered to co-sign a loan enabling Christian Covenant to purchase the property. However, City inspectors ordered Christian Covenant to stop using the building as a church without a special use permit. As a result, Christian Covenant did not purchase the building out of fear the City would not allow the building to be used as a church without a special use permit. Christian Covenant now owns and meets in a church located in an R district.

Between 1990 and 1992, His Word met in the basement of a private home until membership outgrew these accommodations. In 1992, His Word located a suitable building in a C district at 1616 West Pershing. On March 27, 1992, the church signed a purchase contract contingent upon the grant of a special use permit. After filing their special use permit application, His Word met with neighbors in the district who generally supported it. Alderman Patrick Huels stated he would neither support nor oppose the application. On three separate occasions, at the request of Alderman Huels, the Zoning Board postponed a hearing on His Word's application. On October 14, 1992, Alderman Huels introduced an amendment to the Chicago Zoning Ordinance to rezone the property located at 1616 West Pershing from a C district to an M district. After a hearing on December 10, 1992, Alderman William Banks and other aldermen on the Chicago Committee on Zoning of the Chicago City Council voted to recommend approval of the amendment. Both His Word and Citibank, the owner of the building, opposed the rezoning. On December 15, 1992, the Chicago City Council voted to enact the rezoning amendment changing 1616 West Pershing from a C district to an M district. His Word subsequently withdrew its application for a special use

permit; the church spent a considerable sum on filing, attorney's and appraiser's fees. His Word now owns and meets in a church located in an R district.

Plaintiff's Claims and Causes of Action

Plaintiffs' Fourth Amended Complaint contains fourteen counts. Both Plaintiffs and Defendant have filed motions for summary judgment, so for purposes of clarity, the court will address Plaintiffs' counts in clusters. Plaintiff argues (1) the Zoning Ordinance violates the equal protection clauses of the United States and Illinois Constitutions because it treats churches worse than other allegedly similar uses in specific districts (Counts II, VIII)[3]; (2) the process by which zoning legislation is approved by the City Council, and the process by which the ZBA reviews and approves special use applications, deprives Plaintiffs of procedural due process (Count III); (3) the City's Zoning Ordinance violates the first amendment to the United States and Illinois Constitutions because it deprives Plaintiffs of their rights to free exercise of religion, free speech and freedom of assembly (Counts V-VII, IX-XI); (4) the City's Zoning Ordinance violates the Illinois Religious Freedom Restoration Act (IRFRA)(Count XIII); (5) the City's re-zoning of 1616 W. Pershing Road was unconstitutional as to Plaintiff His Word Ministries (Count XII), under a variety of theories; and (6) the City's Zoning Ordinance violates RLUIPA (Count XIV).

SUMMARY JUDGMENT STANDARD

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and

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[3] To maintain consistent count numbers with prior versions of complaints, Plaintiff intentionally omitted Counts I and IV from the Fourth Amended Complaint.

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

"Summary judgment is appropriately entered against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *McKenzie v. Illinois Dept. of Transp.*, 92 F.3d 473, 479 (7th Cir.1996) (citations omitted). A plaintiff cannot rest on mere allegations of a claim without any significant probative evidence that supports his complaint. *Id.; see First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968). "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-34, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Accordingly, the non-moving party is required to go beyond the pleadings, affidavits, depositions, answers to interrogatories and admissions on file to designate specific facts showing a genuine issue for trial. *Id.* at 324, 106 S.Ct. 2548. Nevertheless, in determining the existence of any genuine issue of material fact, the court must draw all reasonable inferences in the light most favorable to the non-movant. *Bank Leumi Le-Israel, B.M. v. Lee*, 928 F.2d 232, 236 (7th Cir.1991).

ANALYSIS

Equal Protection

Counts II and VIII argue the Zoning Ordinance violates the Equal Protection Clause of the Fourteenth Amendment of the

United States Constitution and Article 1 § 2 of the Illinois Constitution.[4] In particular, Plaintiffs allege the Zoning Ordinance allows similar uses to operate as permitted uses in certain B, C, and M districts, while churches must obtain a special use permit to locate in B and C districts and are prohibited from locating in M districts (e.g. clubs, lodges, community centers, recreation centers, restaurants, theaters and colleges).

The Equal Protection Clause mandates that no state shall "deny to any person within its jurisdiction the equal protection of the laws." This clause is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). "Equal protection limits the power of a legislature to target a particular individual, organization, or group by requiring that the legislature confer benefits or impose costs on a larger, neutrally defined group; it cannot pick on just the most vulnerable." *L C & S, Inc. v. Warren County Area Plan Commission*, 244 F.3d 601, 603 (7th Cir.2001). The Supreme Court has established the appropriate standards for determining the validity of state legislation, e.g. zoning ordinances, under the Equal Protection Clause:

> Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classifications challenged be rationally related to a legitimate state interest.

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[4] Equal protection challenges brought under the Illinois Constitution are evaluated under the same standards as equal protection claims under the federal constitution. *Nevitt v. Langfelder*, 157 Ill.2d 116, 124, 191 Ill.Dec. 36, 623 N.E.2d 281, 284 (Ill.1993).

City of New Orleans v. Dukes, 427 U.S. 297, 303, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976).

If the legislative classification negatively affects such a suspect class, then courts may uphold the classification only if it is "precisely tailored to serve a compelling governmental interest." *Sklar v. Byrne*, 727 F.2d 633, 636 (7th Cir.1984)(quoting *Plyler v. Doe*, 457 U.S. 202, 216-17, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982)). Absent an invidious or gender-based classification, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne*, 473 U.S. at 440, 105 S.Ct. 3249. Further, this Circuit has interpreted the above and established the particular application of the Equal Protection Clause to municipal land use decisions. "Absent a fundamental right or a suspect class, to demonstrate a viable equal protection claim in the land-use context, the plaintiff must demonstrate governmental action wholly impossible to relate to legitimate governmental objectives." *Forseth v. Village of Sussex*, 199 F.3d 363, 370-71 (7th Cir.2000); *see also Olech v. Village of Willowbrook*, 160 F.3d 386, 387-88 (7th Cir.1998), *aff'd*, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000); *Esmail v. Macrane*, 53 F.3d 176, 180 (7th Cir.1995); *Unity Ventures v. County of Lake*, 841 F.2d 770, 775 at n. 2 (7th Cir.1988).

First, the Court will address the theory of the present churches constituting a suspect class. While individuals of a particular religious faith may constitute a suspect class requiring heightened scrutiny, there is no proof churches as an entity qualify as a suspect class here. In the context of the Zoning Ordinance, owners of "churches" are operators of the physical structure in which people gather to celebrate and are not a suspect class. *See International Church of the Foursquare Gospel v. City of Chicago Heights*, 955 F.Supp. 878, 881 (N.D.Ill.1996) (zoning ordinance excluding

churches from B districts was rational and survived equal protection challenge); *see also Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 471-72 and fn. 13 (8th Cir. 1991)(classification of churches for land use planning was not analogous to classification based upon the "religious status" of the faithful; zoning ordinance controlling the location of churches was properly evaluated under the rational basis test); *KDM v. Reedsport School District*, 196 F.3d 1046, 1051-52 (9th Cir.1999)("parochial school students are not a suspect class."). While this conclusion is a narrow distinction, it is an important distinction, because a classification based upon the religious preferences of an individual may trigger heightened scrutiny but a classification that merely touches upon religion in general is subject to the standard rational basis equal protection review.

Second, the Zoning Ordinance at issue does not infringe upon a fundamental right to trigger heightened scrutiny. In order to raise the equal protection analysis to heightened scrutiny under the fundamental rights theory, a challenged ordinance must produce "grave interference with important religious tenents" or "affirmatively compel [church members] to perform acts undeniably at odds with fundamental tenents of their religious beliefs." *Griffin High School v. Illinois High School Assoc.*, 822 F.2d 671, 674 (7th Cir.1987)(rule that made it more difficult for student-athletes to transfer to private, religious schools did not infringe upon the free exercise of religion and merited the standard rational basis scrutiny). Here, the Zoning Ordinance cannot be reasonably interpreted to regulate religious beliefs or compel individuals to perform any acts. Rather, the Zoning Ordinance simply limits the location of church buildings, which is not the regulation of belief, any more than regulating the location of the *Chicago Tribune* building is the regulation of the newspaper's first amendment-protected product. The City has the responsibility to create and implement a land use plan for the city as a whole and supervising the location of churches in

this regard is clearly distinguishable from regulating an individual's right to pray, worship or celebrate. Plaintiffs' claims of a suspect class and a fundamental right[5] fail to prove the need for heightened scrutiny and instead merit an equal protection review under the traditional rational basis standard.

Under the rational basis inquiry, the amended Zoning Ordinance as a whole passes the rational basis test. As a preliminary matter, the division of municipal land into various districts and the prohibition of certain uses from each district is a common and accepted practice. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926)(affirming zoning plan that divided town into use districts and prevented land owner from using property in preferred manner). Further, government has a valid public policy motive in proper urban planning. "A city may use zoning regulations as an exercise of the police power to protect residents from the ill effects of urbanization, such as crowding, encroachment of commercial businesses or industries, traffic congestion, and noise." *Cohen v. City of Des Plaines*, 8 F.3d 484, 494 (7th Cir.1993). *See also L C & S, Inc.*, 2001 WL 294312.

In the present case, the City's Zoning Ordinance addresses these goals. By authorizing churches to operate in R districts as a permitted use of right, the City recognizes the historical connection between strong and healthy residential communities and churches. Outside these residential districts, though, the City reasonably maintains churches are less suited to B and C districts, since the goals of these districts to

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[5] Furthermore, in the present case, many of the individual church Plaintiffs are corporations, and it is well established that corporations lack fundamental rights. "Corporations do not have fundamental rights; they do not have liberty interests, period." *Mid-American Waste Sys., Inc. v. City of Gary, Ind.*, 49 F.3d 286, 291 (7th Cir.1995).

promote business and commerce may be hurt by such non-commercial uses. *International Church of the Foursquare Gospel*, 955 F.Supp. at 881. Such broad generalizations may not always be helpful, so the City recognizes exceptions to this general rule. The Ordinance contains a mechanism to allows churches to obtain special use permits to operate in B and C districts.[6] However, in B and C districts, the quarrel between churches and industrial uses might be so significant that the City could rationally conclude the two uses cannot share the area. From the perspective of community management, there are clear economic and social justifications for the City's overall zoning scheme, and these reasons have nothing to do with religion. *Cf. Concerned Citizens of Carderock v. Hubbard*, 84 F.Supp.2d 668, 671-73 (D.Md.2000)(zoning ordinance that permitted churches to operate as of right in a residential district, but required "private clubs" and other allegedly similar uses to obtain a special use permit, did not violate the Establishment Clause; the zoning scheme was motivated by a legitimate secular purpose, i.e. "development which is harmonious and compatible with single family residential use."). Thus, the City's decision to more extensively regulate churches in B, C, and M districts than in R districts is rational.

As stated above, the City's zoning scheme must be viewed as a whole, with attention focused as to how the pieces combine to form the complete zoning scheme. Pursuant to the February 2000 amendments to the Zoning Ordinance[7], most

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[6] Apparently, this mechanism has worked in at least a small fashion, since Plaintiffs Christ Center and Christian Bible Center obtained special uses permits for their current churches.

[7] Plaintiffs argue the fact the City amended the Zoning Ordinances in response to its claims proves the unfairness of the Ordinances; however, this litigation "operated as a wake-up call" to the City and the City "cannot be criticized for having taken a long time to wake up to the need to" adjust and adapt the Ordinances to treat uses differently to reflect the resources and needs of an area. *L C & S, Inc.*, 2001 WL 294312, at *5.

of the uses allegedly similar to churches receive the same treatment.[8] With respect to the remaining allegedly similar uses (e.g.restaurants, taverns, theaters), these uses have a commercial character that differentiates them from churches and makes them a better fit with other uses allowed in B and C districts. The City could determine reasonably that uses cited by Plaintiffs have an industrial character that separates them from churches and makes those uses more appropriate for the industrial districts. *International Church of the Foursquare Gospel*, 955 F.Supp. at 881. Thus, as it pertains to churches, the Zoning Ordinance is rationally related to a legitimate governmental purpose and survives equal protection analysis.

Due Process

Count III appears to challenge the "procedures" by which the City Council zones or re-zones land and the standards used by the ZBA to determine whether to issue a special use permit. However, the court finds it difficult to determine what types of due process claims Plaintiffs have alleged, i.e., whether Plaintiffs are mounting a facial challenge to the Zoning Ordinance or merely complaining of the its [sic] procedures, or both. Apparently, Plaintiffs' second amended complaint clarified Plaintiffs' initial claims somewhat in this regard, *CLUB IV*, 1997 WL 94731, at *2, but Plaintiffs' fourth amended complaint is still unclear. This court will presume Plaintiffs' attack is both a facial challenge to the zoning scheme as a whole and a challenge to the City Council and ZBA's procedures.

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[8] *CLUB I, II, III, IV* and *V* refer to the treatment of churches and similar uses under the old ordinance and under a different standard of review; the amendments adjusted and aligned the uses and districts and thus the factual analyses under these past opinions are of questionable value.

In order to assert a due process claim, a plaintiff must demonstrate a "legitimate claim of entitlement" to the right asserted. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *New Burnham Prairie Homes v. Village of Burnham*, 910 F.2d 1474, 1479 (7th Cir.1990). The Seventh Circuit has recognized the liberty to use one's land as one desires is such a property right within the meaning of due process. *See River Park, Inc. v. City of Highland Park*, 23 F.3d 164 (7th Cir.1994). Further, when the right to use property is affected by an administrative decision, e.g. the denial of a special use permit, a "deprivation" of constitutional rights is at issue and procedural due process is warranted. *Id.* at 166.

The procedures "due" in zoning cases are minimal. *Id.* (citing *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 96 S.Ct. 2358, 49 L.Ed.2d 132 (1976)). "Federal courts are not boards of zoning appeals." *Id;. New Burnham Prairie Homes*, 910 F.2d at 1481; *Estate of Himelstein v. City of Fort Wayne, Ind.*, 898 F.2d 573, 578 (7th Cir.1990). As to the City Council's legislative enactments and the ZBA's processes, the law is clear that the procedures by which these legislative bodies enact legislation provides all the process that is due. *River Park*, 23 F.3d at 166. Municipalities are not required to use adjudicative procedures to make zoning decisions, but may elect to use the political process with no hearings of any kind. *River Park*, 23 F.3d at 166 (citing *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 467-68 (7th Cir.1988)). " 'Legislative due process' seems almost an oxymoron." *LC & S*, 2001 WL 294312, at *1. Because the due process clause permits municipalities to use political methods to decide zoning cases, "the only procedural rules at stake are those local law provides, and these rules must be vindicated in local courts." *River Park*, 23 F.3d at 167. Thus, parties contesting that "state or local regulation of the use of land has gone overbroad must repair to state court." *Id.* Further, the Zoning Ordinance explicitly provides for the

review of zoning decisions by the Illinois Circuit Courts. *See Chicago Zoning Ordinance* § 11.3-4; 65 ILCS 5/11-13-13; 735 ILCS 5/3-104.[9] Therefore, Plaintiffs' claim the Zoning Ordinance fails to provide adequate due process as required by the due process clause of the Fourteenth Amendment is rejected.

First Amendment Claims

Plaintiffs' Counts V, VI, VII, IX, X and XI allege the Zoning Ordinance violates churches' First Amendment rights as to free exercise of religion, freedom of speech and freedom of assembly.

Free Exercise

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. Const., amend. I (1791). As applied to the states by the Fourteenth Amendment, the free exercise clause prohibits local governments from making discretionary (i.e., not neutral, not generally applicable) decisions that burden the free exercise of religion, absent some compelling governmental interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S 520, 531, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993); *Cantwell v. State of Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940)(applying free exercise clause to the states). Land use regulation often

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[9] In evaluating the facts before it when it ruled on the motion to dismiss in *CLUB I*, the court interpreted the present matter as an extraordinary zoning matter, with a remedy laying beyond state court. However, since Plaintiffs challenge the "vague" zoning standards and procedures, such an attack is one that might be presented by any property owner seeking a special use permit, i.e. it is a claim focused on property rights rather than any particular use or "fundamental liberty." Thus, it is a claim that attacks a procedural rule and may be raised in state court. *River Park*, 23 F.3d at 167.

involves "individualized governmental assessment of the reasons for the relevant conduct," thus triggering *City of Hialeah* scrutiny. *Id.* at 537, 113 S.Ct. 2217. For example, local officials may be asked to determine whether the historic preservation of a district outweighs the financial interests of a specific parcel owner. *Keeler v. Mayor & City Council of Cumberland*, 940 F.Supp. 879, 886 (D.Md.1996). Thus, zoning is a common source of tension between religious organizations and local authorities, and sends many churches (temples, synagogues or mosques) to the courthouse.[10]

Modern free exercise claims are controlled by the seminal cases *Employment Div., Dept. of Human Resources of Oregon v. Smith* and *City of Hialeah*[11]. Under *Smith*, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *City of Hialeah*, 508 U.S. at 531, 113 S.Ct. 2217. Under *City of Hialeah*, a law is not "neutral" if "the *object* of [the] law is to infringe upon or restrict practices *because* of their religious motivation." *Id.* at 533, 113 S.Ct. 2217 (emphasis added). A substantial burden exists when the government pressures a plaintiff to modify her behavior and violate her beliefs, *Jolly v. Coughlin*, 76 F.3d 468, 477 (2nd

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[10] *See e.g., Love Church v. City of Evanston*, 896 F.2d 1082 (7th Cir.1990); *Biblia Abierta*, 129 F.3d 899; *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8th Cir.1991); *Christian Gospel Church, Inc. v. City and County of San Francisco*, 896 F.2d 1221 (9th Cir.1990); *First Assembly of God of Naples, Florida, Inc. v. Collier County, Florida*, 20 F.3d 419 (11th Cir.1994); *Boyajian v. Gatzunis*, 212 F.3d 1 (1st Cir.2000); *Daytona Rescue Mission, Inc. v. City of Daytona Beach*, 885 F.Supp. 1554 (M.D.Fla.1995); *St. Paul's Protestant Episcopal Church v. City of Oakwood*, 1998 WL 1657172 (S.D.Ohio 1998); *Al-Salam Mosque Foundation v. City of Palos Heights*, No. 00 C 4596, 2001 WL 204772 (N.D.Ill. March 1, 2001).

[11] The court will address the applicability of the recently passed Religious Land Use and Institutionalized Persons Act below.

Cir.1996), by, for example, discriminating against her because of her religious belief, inhibiting her dissemination of particular religious views or pressuring her to forgo a religious practice. *Battles v. Anne Arundel Co. Bd. of Educ.*, 904 F.Supp. 471, 477 (D.Md.1995). In the present case, the Zoning Ordinance as a whole and the special use provisions are neutral, generally applicable laws. First, these laws are neutral because the object of the Zoning Ordinance and special use provisions is to regulate land use and development. The record fails to support Plaintiff's argument that the Zoning Ordinance was enacted with the purpose of suppressing the celebration of religion in Chicago. As stated above, any burdens on the use of property were and are motivated by a legitimate concern for the health and safety of Chicagoans and the economic development of Chicago. *See Cornerstone Bible Church*, 948 F.2d at 472. Moreover, the Zoning Ordinance is generally applicable since it does not "impose burdens only on conduct motivated by religious belief," i.e. the use regulations impact or "burden" all land owners within the City who seek a special use permit. *Id.* at 543, 113 S.Ct. 2217; *see International Church of the Foursquare Gospel*, 955 F.Supp. at 880. Plaintiffs maintain they have suffered hardship and inconvenience in their attempts to secure a location in which to celebrate their faith. For example, Plaintiffs argue the Zoning Ordinance process is an economic hardship on smaller churches because these churches lack the funds and resources to apply for and receive a permit. Must the City waive the application fees for churches? Must the municipality provide free legal services to churches? Must the government expedite special use permit applications filed by churches?[12] The answer is no, because

[12] The amended special use provisions automatically approve applications submitted by a church if no action is taken on the application within 120 days, so the provisions arguably serve to expedite churches' applications.

such obstacles face all similarly situated applicants. As the Seventh Circuit stated, "[W]hatever specific difficulties [the church] claims to have encountered, they are the same ones that face all rentors, not merely churches. The harsh reality of the marketplace sometimes dictates that certain facilities are not available to those who desire them." *Love Church*, 896 F.2d at 1086. The "burden," i.e. the requirement that an individual must go through the processes and meet the standards, is a requirement imposed on all special use applicants, regardless of the character of the proposed use. Therefore, the Zoning Ordinance and related provisions are valid neutral and generally applicable zoning regulations that impose no substantial burden to the free exercise of religion.

Freedom of Speech and Assembly

Plaintiffs base their free speech and assembly claims on the presumption that the Zoning Ordinance implicates these First Amendment clauses by limiting the location of churches in the City. The First Amendment protections as to speech and assembly are not so all-encompassing as to include all activity in which an idea, goal or value is promoted. Zoning restrictions that have an incidental effect on the ability of people to congregate as they desire are subject to rational basis scrutiny. *See Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974). Here, Plaintiffs argue they are entitled to heightened scrutiny because they engage in religious speech.[13] However, the operation of a

[13] Plaintiffs allege "plaintiff churches are 'merchants', businesses with a spiritual rather than a physical product." (Pl. Compl. at 10; Pl. Resp. Def. Mot. Summ. J. at 10). Commercial speech has traditionally been accorded fewer First Amendment protections than non-commercial speech. *See generally Central Hudson Gas v. Public Service Commission*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980); *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995). If the court were

house of worship does not equate with "religious speech," any more than the operation of a shoe store equates with commercial speech. *There to Care, Inc. v. Comm'r of Indiana Dept. of Revenue*, 19 F.3d 1165 (7th Cir.1994). The operation of a business, including a charitable business, is subject to zoning laws, even if the business makes its money by engaging in conduct within the core of the First Amendment. *Id.* at 1167. When the object of the law is unrelated to expression, e.g. harmonious land use here, the free speech clause is not implicated, even if the law in question limits the ability to disseminate one's message. *Id.* at 1168. For the above reasons, Plaintiff's First Amendments claims are rejected.

Illinois Religious Freedom Restoration Act

As the court is granting summary judgment to the City on Plaintiffs' federal claims, the court dismisses Count XIII pursuant to 28 U.S.C. § 1367(c). *See Groce v. Eli Lilly & Co.*, 193 F.3d 496, 501 (7th Cir.1999)("[I]t is the well-established law of this circuit that the usual practice is to dismiss without prejudice state supplemental claims whenever all federal claims have been dismissed prior to trial.") In light of the Illinois Supreme Court's recent ruling on this novel and complex state law, this court dismisses the claim arising from the Illinois Religious Freedom Restoration Act. *City of Chicago Heights v. Living Word Outreach Full Gospel Church*, 196 Ill.2d 1, 255 Ill.Dec. 434, 749 N.E.2d 916 (2001).

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to apply the accepted law of commercial speech to Plaintiffs' comments, Plaintiffs would lose, rather than gain, First Amendment protections.

Re-zoning of 1616 West Pershing Road

In Count XII, Plaintiff His Word Ministries to All Nations ("His Word") maintains it had a contingent option to purchase 1616 W. Pershing, but that the re-zoning of the property violated His Word's constitutional rights, specifically Plaintiff's free exercise protection, federal equal protection and federal procedural due process.

His Word's procedural due process argument was addressed above and in the Seventh Circuit's *Biblia Abierta* opinion. Under the law of the case, the re-zoning of 1616 W. Pershing was a legislative act. *Biblia Abierta*, 129 F.3d at 904-05. Thus, the legislative process provided the procedural due process and His Word is entitled to no more.[14] Similarly, His Word's free exercise claim is controlled by *Biblia Abierta*, where the Seventh Circuit ruled "[i]n passing the ordinances, the Zoning Committee and the City Council created neutral, prospective rules that apply to all current and future owners of the property." *Id.* at 904. Since *Smith* and *City of Hialeah* hold there can be no free exercise claim if the law at issue is neutral and generally applicable, His Word's free exercise claim is dismissed. Further, since His Word's first amendment claim is dismissed, Plaintiff's federal equal protection claim is generic and subject to rational basis scrutiny. *See Coniston*, 844 F.2d at 467-68; *Biblia Abierta*, 129 F.3d at 904. The reasons for the re-zoning are rationally related to the City's interests in developing commercial areas and minimizing land use conflicts: prior to the re-zoning of

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[14] While the conduct of certain individuals (e.g. Huels) may be egregious and may even have risen to the level of dishonorable, the system in which they operate is not unconstitutional and is acceptable under a rational basis test. "That the plaintiffs were the target, and so far as appears the only target, of the amendment is plain . . . But this does not establish that the amendment was not a bona fide legislative measure. It is utterly commonplace for legislation to be incited by concern over one person or organization." *L C & S*, 244 F.3d 601, 604.

1616 W. Pershing, all four corners of Ashland and Pershing were zoned M and the majority of the property extending from the corners was zoned M. Thus, the re-zoning of 1616 W. Pershing to M passes the rational basis test.

Religious Land Use and Institutionalized Persons Act

Plaintiffs amended their complaint to include Count XIV, a claim under the recently passed Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C.A. § 2000cc et seq. "The concept of a religious freedom restoration act began as the congressional response to the much-criticized Supreme Court decision in *Employment Division, Department of Human Resources v. Smith.*" Mary Jean Dolan, The Constitutional flaws in the New Illinois Religious Freedom Restoration Act: Why RFRAs Don't Work, 31 Loy.U.Chi.L.J. 153, 153-154 (2000).[15] The federal Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4 (1994), like its state counterparts, sought to rescind *Smith* and restore what proponents refer to as the pre-*Smith* standard: the "compelling interest/least restrictive means" test found in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). In 1997, the Supreme Court struck down the RFRA in *City of Boerne v. Flores*, primarily on federalism grounds. *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). The Court held Congress lacked the power under the Enforcement Clause of the Fourteenth Amendment to change the meaning of the First Amendment. Last year, Congress responded with RLUIPA, a law similar to RFRA.

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[15] An inadvertent oversight in an earlier opinion omitted a citation to Ms. Dolan and failed to recognize her helpful analysis. The Court appreciates her contribution and insight on these issues.

Assuming that RLUIPA is constitutional, it does not effect the outcome, because RLUIPA is inapplicable to the present matter by its own terms. As stated above, the City amended its Zoning Ordinance in February 2000 and adjusted its policies concerning special use permits and related districts. By removing any potential substantial burden, the City has avoided the threat of heightened scrutiny under RLUIPA.[16] 42 U.S.C.A. § 2000(5)(e). Thus, Defendant's motion for summary judgment on Count XIV is granted.

CONCLUSION

For the foregoing reasons, Defendants' motions for summary judgment are GRANTED and Plaintiffs' motion for summary judgment is DENIED. IT IS SO ORDERED.

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[16] (e) Governmental discretion in alleviating burdens on religious exercise:

> A government may avoid the preemptive force of any provision of this chapter by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

APPENDIX D

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

No. 01-4030
No. 94 C 6151

November 26, 2003

CIVIL LIBERTIES FOR URBAN BELIEVERS, CHRIST CENTER, CHRISTIAN COVENANT, OUTREACH CHURCH, et al.,
Plaintiffs-Appellants,

v.

CITY OF CHICAGO,
Defendant- Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

ORDER

Before Hon. William J. Bauer, *Circuit Judge*, Hon. Richard A. Posner, *Circuit Judge*, Hon. Terence T. Evans, *Circuit Judge*

William J. Hibbler, *Judge.*

On September 3, 2003, plaintiffs-appellants filed a petition for rehearing *en banc* in connection with the above-referenced case. On October 8, 2003, a petition for rehearing

of intervenor the United States and answer to appellants' petition for rehearing *en banc* was filed and on October 27, 2003, a consolidated answer to petition for rehearing was filed by the city of Chicago. No judge in active service has requested a vote on the petition for rehearing *en banc* and all of the judges on the original panel have voted to deny rehearing *en banc.* It is, therefore, ORDERED that the petition for rehearing *en banc* is DENIED.

APPENDIX E

CONSTITUTIONAL PROVISIONS

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX F

STATUTORY PROVISION

42 U.S.C. § 2000cc. Protection of land use as religious exercise

(a) Substantial burdens

(1) General rule

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application

This subsection applies in any case in which—

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make,

individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion

(1) Equal terms

No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination

No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusions and limits

No government shall impose or implement a land use regulation that—

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

(Pub. L. 106-274, § 2, Sept. 22, 2000, 114 Stat. 803.)

(4)

No. 03-1397

Supreme Court, U.S.
FILED
MAY 7 - 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CIVIL LIBERTIES FOR URBAN BELIEVERS, CHRIST CENTER, CHRISTIAN COVENANT OUTREACH CHURCH, HIS WORD MINISTRIES TO ALL NATIONS, CHRISTIAN BIBLE CHURCH, CHURCH ON THE "WAY" PRAISE CENTER, AND MONTE DE SION (MOUNT ZION) CHURCH,
Petitioners,

v.

CITY OF CHICAGO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Equal Protection Clause requires any form of heightened scrutiny for a zoning law that treats religious land use as a separate zoning classification and confines religious land use to specified zoning districts.

2. Whether a zoning law imposes a substantial burden on the free exercise of religion when it permits religious land use as a matter of right in residential zoning districts and provides for religious land use by a special use permit that is liberally granted in commercial and business zoning districts.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT	1
ARGUMENT	5
I. RATIONAL BASIS SCRUTINY APPLIES TO AN EQUAL PROTECTION CHALLENGE OF A ZONING ORDINANCE THAT REGULATES RELIGIOUS LAND USE	6
II. THE CONFLICT AMONG THE CIRCUITS ABOUT THE CONTOURS OF HYBRID RIGHTS PROVIDES NO BASIS FOR PLENARY REVIEW	17
III. A ZONING ORDINANCE THAT LEAVES OPEN REASONABLE LOCATION OPPORTUNITIES FOR A CHURCH IMPOSES NO SUBSTANTIAL BURDEN ON RELIGION	21
CONCLUSION	28

TABLE OF AUTHORITIES

CASES	Page
American Communications Association v. Douds, 339 U.S. 382 (1950)	27
Axson-Flynn v. Johnson, 356 F.3d 1277 (10th Cir. 2004)	18, 20
Board of Trustees v. Garrett, 531 U.S. 356 (2001)	11
Brown v. Hot, Sexy & Safer Products, Inc., 68 F.3d 525 (1st Cir. 1995), cert. denied, 516 U.S. 1159 (1996)	19
Califano v. Westcott, 443 U.S. 76 (1979)	16
Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67 (Cal. 2004)	20
Christian Gospel Church v. City & County of San Francisco, 896 F.2d 1221 (9th Cir.), cert. denied, 498 U.S. 999 (1990)	12, 22
Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993)	19, 24
City of Boerne v. Flores, 521 U.S. 507 (1997)	4
City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985)	*passim*
City of Colorado Springs v. Blanche, 761 P.2d 212 (Colo. 1988)	23
Congregation Kol Ami v. Abington Township, 309 F.3d 120 (3d Cir. 2002)	12, 13
Cornerstone Bible Church v. City of Hastings, 948 F.2d 464 (8th Cir. 1991)	12, 13, 18
Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville, 203 P.2d 823 (Cal. Ct. App.), appeal dismissed, 338 U.S. 805 (1949)	26, 27
Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. City of West Linn, 86 P.3d 1140 (Or. Ct. App. 2004)	23

TABLE OF AUTHORITIES—Continued

	Page
Employment Division v. Smith, 494 U.S. 872 (1990)	*passim*
First Covenant Church v. City of Seattle, 840 P.2d 174 (Wash. 1992)	24
F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920)	6
Grosz v. City of Miami Beach, 721 F.2d 729 (11th Cir. 1983)	22
Heckler v. Mathews, 465 U.S. 728 (1984)	16
Hernandez v. Commissioner, 490 U.S. 680 (1989)	21, 25
Hoover v. Ronwin, 466 U.S. 558 (1984)	8
Islamic Center of Mississippi, Inc. v. City of Starkville, 840 F.2d 293 (5th Cir. 1988)	24
Jimmy Swaggart Ministries v. Board of Equalization of California, 493 U.S. 378 (1990)	25
Kissinger v. Board of Trustees, 5 F.3d 177 (6th Cir. 1993)	19
Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303 (6th Cir.), cert. denied, 464 U.S. 815 (1983)	22-23
Leebaert v. Harrington, 332 F.3d 134 (2d Cir. 2003)	19
Locke v. Davey, 124 S. Ct. 1307 (2004)	*passim*
Marks v. City of Chesapeake, 883 F.2d 308 (4th Cir. 1989)	14
Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976)	7
Memphis Community School District v. Stachura, 477 U.S. 299 (1986)	16
Messiah Baptist Church v. County of Jefferson, 859 F.2d 820 (10th Cir. 1988), cert. denied, 490 U.S. 1005 (1989)	22

TABLE OF AUTHORITIES—Continued

Page

Midrash Sephardi, Inc. v. Town of Surfside, No. 03-13858, 2004 WL 842527 (11th Cir. Apr. 21, 2004) 12, 13, 22
Miller v. Reed, 176 F.3d 1202 (9th Cir. 1999) 20
Minney v. City of Asuza, 330 P.2d 255 (Cal. Ct. App. 1958) 23
North Pacific Union Conference Association v. Clark County, 74 P.3d 140 (Wash. Ct. App. 2003) 23
Orr v. Orr, 440 U.S. 268 (1979) 16
Personnel Administrator v. Feeney, 442 U.S. 256 (1979) 10
Rector, Wardens, and Members v. City of New York, 914 F.2d 348 (2d Cir. 1990), cert. denied, 499 U.S. 905 (1991) 22
Reed v. Reed, 404 U.S. 71 (1971) 6-7
San Jose Christian College v. City of Morgan Hill, 360 F.3d 1024 (9th Cir. 2004) 22
Sherbert v. Verner, 374 U.S. 398 (1963) 25, 26
Sprietsma v. Mercury Marine, 537 U.S. 51 (2002) 8
Swanson v. Guthrie Independent School District No. I-L, 135 F.3d 694 (10th Cir. 1998) 20
Tenafly Eruv Association v. Borough of Tenafly, 309 F.3d 144 (3d Cir. 2002), cert. denied, 123 S. Ct. 2609 (2003) 19
Thiry v. Carlson, 78 F.3d 1491 (10th Cir.), cert. denied, 519 U.S. 821 (1996) 23
Thomas v. Anchorage Equal Rights Commission, 165 F.3d 692 (9th Cir. 1999), vacated as unripe, 220 F.3d 1134 (2000) (en banc) 18, 20, 21
Thomas v. Review Board, 450 U.S. 707 (1981) 26
United States v. Lee, 455 U.S. 252 (1982) 10

TABLE OF AUTHORITIES—Continued

	Page
Vance v. Terrazas, 444 U.S. 252 (1980)	17-18
Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977)	10
Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)	6
Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)	14
Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142 (1980)	16
CONSTITUTION, STATUTE, RULE, AND ORDINANCES	
U.S. Const. amend. I	*passim*
U.S. Const. amend. XIV	*passim*
42 U.S.C. § 2000cc (2000)	4
Sup. Ct. R. 14.1(a)	16
Municipal Code of Chicago, Ill. § 17-6.4-2 (2003)	9
Municipal Code of Chicago, Ill. § 17-11.9-1 (2003)	3
Municipal Code of Chicago, Ill. § 17-11.10-4 (2003)	2
Municipal Code of Chicago, Ill. § 17-11.10-7.5 (2003)	2

IN THE

Supreme Court of the United States

No. 03-1397

CIVIL LIBERTIES FOR URBAN BELIEVERS, CHRIST CENTER, CHRISTIAN COVENANT OUTREACH CHURCH, HIS WORD MINISTRIES TO ALL NATIONS, CHRISTIAN BIBLE CHURCH, CHURCH ON THE "WAY" PRAISE CENTER, AND MONTE DE SION (MOUNT ZION) CHURCH,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

The Chicago Zoning Ordinance divides the City into several broad use districts, including "R" for residential; "B" for business; "C" for commercial; and "M" for manufacturing. R. 125 ¶ 5. Churches are permitted uses in all R districts. *Id.* ¶ 7. The majority of property available for development is zoned R. *Id.* ¶ 14. By allowing churches as permitted uses in R districts, the zoning ordinance recognizes the traditional role that churches have played in residential communities, where their presence is an important amenity that adds to the quality of life and prosperity of those commu-

nities. *Ibid.* Because of their function as places of worship and spiritual inspiration, churches provide essential public services to neighborhoods. *Ibid.*

Churches are special uses in all B districts as well as in all but one of the C districts. R. 125 ¶ 7. Special uses require approval from the Chicago Zoning Board of Appeals ("ZBA"). *Id.* ¶ 6. Ordinarily, an applicant for a special use permit must show that its use is "necessary for the public convenience"; that the public health, safety, and welfare will be protected; that the use will not substantially injure the value of neighboring property; and that the use conforms with other applicable provisions of the code. See Municipal Code of Chicago, Ill. § 17-11.10-4 (2003). A church applicant is not required to demonstrate that the proposed use is "necessary for the public convenience at that location." *Id.* § 17-11.10-7.5. In addition, an application for a special use permit by churches only will be considered granted if the ZBA does not render a decision within 120 days. *Ibid.*

Within B and C districts, the zoning ordinance allows churches only as special uses because churches are not always a good fit. R. 125 ¶ 15. The goals of such districts are to provide retail and commercial services to residents and to foster economic growth. *Ibid.* The use of land in B and C districts for noncommercial purposes limits commercial development by occupying land that would otherwise be available for commercial uses and interrupting contiguous and interdependent commercial zones, *i.e.*, a street or series of streets that attracts "retail traffic" based on the concentration of commercial businesses. *Id.* ¶ 16. In addition, given the nature of certain church activities, including the need for quiet and programs for children, the City Council determined that churches should be kept apart from certain commercial businesses and excluded from more congested commercial streets. *Id.* ¶ 17. The zoning ordinance recog-

nizes that there are exceptions to these general rules, and thus allows churches to locate in B and C districts by obtaining special use permits. *Id.* ¶ 18.

Churches are restricted from C4 and M districts because their use is incompatible with the commercial and manufacturing uses there, which often create noise, dust, and traffic. R. 124 ¶ 17. To use property in a manner that is not a permitted or special use, the owner must obtain a map amendment changing the zoning classification. See Municipal Code of Chicago, Ill. § 17-11.9-1 (2003).

Since an amendment to the ordinance enacted on February 16, 2000, clubs, lodges, meeting halls, recreation buildings, and community centers are treated like churches in B, C, and M districts—they must obtain special use permits to locate in B and C districts and are not allowed at all in M districts. R. 125 ¶¶ 8-9. In R districts, recreation buildings and community centers are special uses; some clubs and lodges are permitted in some R districts and not others; and meeting halls are neither permitted nor special uses. *Id.* ¶ 10.

A vast number of churches have been able to find locations in the City. The 1999 Yellow Pages for the City of Chicago lists the phone numbers and addresses of more than 2000 churches, synagogues, and mosques in the City. R. 152 ¶ 2. Between October 1997 and July 2000, the ZBA granted 36 special use permits for churches to locate in B and C districts and 18 special use permits for existing churches to expand in R, B, and C districts. *Id.* ¶ 1. Each individual church plaintiff in this case has found a home in the City limits, either by locating in an R district or by obtaining a special use permit in a B or C district. *Id.* ¶ 3.

Petitioners, Civil Liberties for Urban Believers and five individual churches, filed a complaint to challenge the zoning ordinance's restrictions on church location. R. 1. Petitioners' fourth amended complaint alleged that these restrictions

violate sections 2(a) and 2(b) of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc (2000), as well as the Equal Protection, Free Exercise, Free Speech, and Due Process Clauses of the United States Constitution. R. 147. After discovery, the district court granted the City's motion for summary judgment. Pet. App. 43a.

The court of appeals affirmed. Pet. App. 1a. The court of appeals rejected petitioners' claims under RLUIPA, reasoning that compliance with the City's zoning ordinance does not substantially burden churches in violation of section 2(a), and that the 2000 amendment to the zoning ordinance, placing churches on equal footing with nonreligious assembly uses, complies with RLUIPA's section 2(b). Pet. App. 13a-15a.[1] The court also rejected each of petitioners' attacks on the facial constitutionality of the ordinance. The court held that petitioners' facial challenge to the zoning ordinance under the Free Exercise Clause fails because the zoning ordinance, which does not aim to inhibit religion and applies to all land uses in the City, is a neutral law of general applicability. Pet. App. 18a-19a. The court also held that the special use, map amendment, and planned development processes are not systems of individualized exemptions from generally applicable law that trigger heightened scrutiny. Pet. App. 18a. And the court rejected petitioners' argument that this case involves hybrid rights that would require heightened scrutiny because petitioners have identified no other constitutionally protected right that is infringed by the zoning ordinance. Pet. App. 19a. The court also found petitioners' free speech and free assembly claims without merit because the zoning ordinance is a valid time, place, and manner restriction that

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[1] Having rejected petitioners' RLUIPA claims, the court found it unnecessary to reach our submission that RLUIPA exceeds the scope of congressional authority to enforce the Fourteenth Amendment. See Pet. App. 15a. See generally *City of Boerne v. Flores*, 521 U.S. 507 (1997).

leaves ample opportunity for churches to locate in Chicago. Pet. App. 20a-21a. Turning to petitioners' equal protection claim, the court held that, because this case involves neither a suspect classification nor a fundamental right, the zoning ordinance should be reviewed under the rational basis test and that the challenged restrictions on church use are rationally related to legitimate land use objectives. Pet. App. 21a-23a. Finally, the court rejected petitioners' due process claim, holding that the legislative process provides churches with all the process that is due. Pet. App. 24a.[2]

Judge Posner dissented on the equal protection issue only. Pet. App. 25a. Judge Posner stated that a higher level of scrutiny is required because *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), "instantiates though it does not articulate the proposition that discrimination against sensitive uses is to be given more careful, realistic, skeptical scrutiny by the courts than discrimination against purely commercial activities." Pet. App. 28a. Judge Posner then opined that a higher level of scrutiny is warranted in this case because churches are a sensitive land use and Chicago's zoning ordinance discriminates against "new, small or impecunious churches." Pet. App. 29a.

ARGUMENT

Chicago's zoning ordinance treats religious land use liberally. Churches may locate as a matter of right in any R district, where there is the most land available for development. Churches may also locate in all B and most C districts if they obtain special use permits, which are granted liberally. Thousands of churches have opened in Chicago,

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[2] The court also rejected a claim brought on behalf of one of the individual plaintiffs, His Word, that the zoning ordinance was not neutrally applied to its application for a zoning amendment, holding that there was no evidence that the City Council acted with an illicit motivation in rejecting the application. Pet. App. 18a.

including petitioners' churches. Neither the terms of the zoning ordinance nor its practical application has served as an impediment to religion in general or to the individual churches in this case.

Petitioners claim that plenary review is warranted because the circuits are in conflict on the proper standards to be applied to regulation of religious land use. While petitioners seize on minor variations in the way various circuits have defined the standard of review, these differences have no substance. No circuit applies any form of heightened scrutiny to zoning laws merely because they treat religious land use as a separate zoning category and confine religious land use to specified zoning districts, and no circuit holds that a zoning law imposes an impermissible burden on religion merely because it is likely to make it more difficult or expensive for a church to locate—all zoning laws do that.

Chicago's zoning ordinance rationally treats churches differently from secular uses of land. Religion has no secular equivalent, and Chicago's ordinance actually treats churches more liberally than secular assembly uses. Nor do the fact-bound details of Chicago's regulation of religious land use merit this Court's review. The petition should be denied.

I. RATIONAL BASIS SCRUTINY APPLIES TO AN EQUAL PROTECTION CHALLENGE OF A ZONING ORDINANCE THAT REGULATES RELIGIOUS LAND USE.

Zoning laws are regarded as "economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be 'reasonable, not arbitrary' and bears a 'rational relationship to a (permissible) state objective.'" *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974) (citations omitted) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920), and *Reed v. Reed*, 404 U.S.

71, 76 (1971)). Accordingly, in *Cleburne*, this Court held that a zoning law should ordinarily be upheld as long as it is supported by a rational basis. See 473 U.S. at 440-42. Following *Cleburne*, the court of appeals in this case held that petitioners' equal protection attack on the Chicago Zoning Ordinance was subject to rational basis scrutiny. See Pet. App. 21a-22a.

Petitioners argue that something more than rational basis review is required here because this case involves a "sensitive use" and discriminates in favor of well-established churches. See Pet. 10-13.[3] This case is not an appropriate vehicle to consider petitioners' novel argument for several reasons. First, the argument is waived. It was not advanced below and is not supported by the record. Second, petitioners' claim ignores settled precedent rejecting heightened scrutiny based only on the disproportionate impact that a challenged law may have on minorities. Third, the holding below is not in

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[3] Petitioners make a cursory suggestion that a law that treats religious land use as a separate zoning classification is suspect and therefore subject to strict scrutiny. See Pet. 14 n.4. The Court's recent decision in *Locke v. Davey*, 124 S. Ct. 1307 (2004), quickly lays this argument to rest. There, the State of Washington singled out religious students for different treatment, excluding them from access to state scholarship funds. See *id.* at 1310. The Court held that, under the Equal Protection Clause, only rational basis scrutiny was required. See *id.* at 1312 n.3. This decision followed from the Court's earlier decisions, which have found a class to be suspect or quasi-suspect only where it has experienced the type of "history of purposeful unequal treatment" or "been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976). Accord, *e.g.*, *Cleburne*, 473 U.S. at 441-42. While a law targeting a particular religion or group of believers might meet these criteria, a classification that treats all religions the same plainly does not. And while petitioners claim that some circuits have "suggested that religion may be a suspect class" (Pet. 14 n.4), no circuit has ever reached such a conclusion. Nor is any circuit likely to so hold in light of this Court's holding in *Locke*.

conflict with either the Court's decision in *Cleburne* or the law in any other circuit. Uniformly, the courts of appeals have followed *Cleburne* and applied rational basis review to equal protection challenges of religious land-use regulation.

1. Petitioners' argument for heightened scrutiny is cribbed from Judge Posner's dissent, which claimed that the usual rational basis test was not sufficient because churches are a "sensitive use" and Chicago's zoning ordinance "discriminates in favor of well-established sects." Pet. App. 29a. Until this argument made its debut in Judge Posner's dissenting opinion below, however, petitioners had never argued for some heightened version of rational-basis review, and had never claimed that the Chicago Zoning Ordinance favored particular sects, denominations, or churches. Petitioners argued instead for strict scrutiny on the grounds that a fundamental First Amendment right was at stake and that the Chicago Zoning Ordinance's treatment of religious land use created a suspect classification; otherwise, they confined their equal protection arguments to review under the traditional rational-basis test. Arguments that have not been raised below are waived. See, *e.g.*, *Sprietsma v. Mercury Marine*, 537 U.S. 51, 55 n.4 (2002). Nor will the Court consider arguments not advanced until a petition for rehearing is filed in the court of appeals. See, *e.g.*, *Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984).

Petitioners' failure to claim that the Chicago Zoning Ordinance discriminates against "new, small, or impecunious churches" (Pet. App. 29a), makes this case particularly unsuitable for review because this assertion was not the object of the parties' evidentiary submissions. Therefore, a claim of discriminatory treatment is not supported by the record. For example, Judge Posner opined that well-established sects are treated more favorably by the ordinance because the established sects acquired land "in residential areas when such land was relatively cheap and abundant, and therefore

affordable by noncommercial entities," and because older churches that have been grandfathered in commercial zones "have managed to get permission to build over the years in nonresidential zones." Pet. App. 29a. Judge Posner also believes "new, small, or impecunious churches" are not likely "to have the resources necessary for building [a] place of worship in a residential area other than a slum . . . ." Pet. App. 29a-30a. But the record supports none of these assertions. The record contains no studies or testimony about whether residential land was more affordable than commercial property when established sects located their churches, or even about the relative cost of comparable residential and commercial properties today. Nor is there any reason to believe no established sect needs a new church for many of the same reasons that new sects are searching for a place to locate—*e.g.*, because they have outgrown old facilities, desire a better location, or are attracting different congregants. These congregations, therefore, would face the same exact obstacles as new churches. So, too, the idea that grandfathered churches are treated more favorably when they seek to expand churches in commercial areas is wholly unfounded. The zoning ordinance, on its face, does not exempt these churches, which must apply for permits that are reviewed under the same criteria as any other church when they seek to expand in ways that do not conform to current zoning. See Municipal Code of Chicago, Ill. § 17-6.4-2 (2003). If anything, the record discloses that all kinds of applications for special use permits are liberally granted, to old and new denominations alike, whether for expansion of an old church or the opening of a new church. R. 152, Exh. A.

Perhaps, in another case, a plaintiff might be able to prove that confining religious land use to residential zoning districts has a discriminatory impact on particular denominations, sects, or churches. No such claim, however, has been made or supported in this case.

2. Judge Posner's dissent urges heightened review not on the basis of any distinction found on the face of the zoning ordinance—which treats all religious land use the same—but based on a perceived discriminatory impact. This view flies in the face of the Court's settled precedent holding that even when a law disproportionately disadvantages a protected minority, the Equal Protection Clause does not require heightened scrutiny merely because of that disproportionate burden. See, *e.g. Personnel Administrator v. Feeney*, 442 U.S. 256, 271-72 (1979); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-66 (1977).

Judge Posner's view is also at odds with this Court's decisions under the First Amendment's Free Exercise Clause. Generally applicable laws frequently impose disproportionate burdens on new or nontraditional religions; in *Employment Division v. Smith*, 494 U.S. 872 (1990), for example, the law at issue proscribed the ingestion of peyote, even when used "for sacramental purposes at a ceremony of the Native American Church." *Id.* at 874. At issue in *United States v. Lee*, 455 U.S. 252 (1982), was an Amish believer's claim to an exemption from the payment of social security taxes on the ground that his religion forbade him to support governmental programs. See *id.* at 258-60. These cases both involved laws that effectively discriminated only against minority sects, and yet in both cases this Court held that no heightened scrutiny was warranted. See *Smith*, 494 U.S. at 878-80; *Lee*, 455 U.S. at 258-61. Surely, if minority sects were entitled to heightened constitutional protection against neutral and generally applicable laws because they impose disproportionate burdens on those denominations, the source for such protection would be the Free Exercise Clause; and yet heightened scrutiny on this basis has been rejected. There is no reason to read the Equal Protection Clause as providing more protection for religious exercise than does the Free Exercise Clause.

3. The court of appeals' holding is supported by this Court's decision in *Cleburne*, which rejected an argument that heightened review should be applied when a zoning law blocks an especially sensitive or important use of land. After deciding that mentally retarded persons bear none of the indicia of a suspect or quasi-suspect classification, the Court held: "To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be *rationally related to a legitimate governmental purpose.* . . . The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction *arbitrary or irrational.*" 473 U.S. at 446 (emphasis added). See also *Board of Trustees v. Garrett*, 531 U.S. 356, 366 (2001) (characterizing *Cleburne* as imposing "only the minimum 'rational basis' review"). The zoning restrictions there, however, did not survive rational basis scrutiny because none of the city's reasons plausibly explained why homes for the mentally retarded should be treated differently than similar residential uses. See 473 U.S. at 448-50. This led the Court to conclude that the zoning law "rest[s] on an irrational prejudice against the mentally retarded . . . ." *Id.* at 450. That holding has no application here.

In this case, even petitioners do not contend that the Chicago City Council harbors prejudice against religion. Surely Chicago's zoning ordinance does not reflect an irrational prejudice against religion in general or new denominations in particular. The ordinance is facially neutral, giving all religious denominations and sects equal opportunities to locate in Chicago. The ordinance reflects no prejudice against religion; even Judge Posner acknowledged that "Chicago is not dominated by atheists." Pet. App. 28a. The ordinance leaves ample opportunities for religious land use in Chicago. Indeed, thousands of churches operate in Chicago, including petitioners' churches. In fact, the zoning ordinance treats churches considerably more favorably than secular

assembly uses—churches, and no other assembly use, have free access to residential districts, where the majority of land in Chicago is available for development. There is accordingly no justification for heightened review—much less invalidation—of the ordinance.

4. Petitioners have identified no conflict among the circuits. No circuit has held that the Equal Protection Clause requires heightened review for laws regulating religious land use. In fact, all circuits that have addressed a church's equal protection challenge to a zoning ordinance have applied bare rational basis review. See *Congregation Kol Ami v. Abington Township*, 309 F.3d 120, 133 (3d Cir. 2002); *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 471 (8th Cir. 1991); *Christian Gospel Church v. City & County of San Francisco*, 896 F.2d 1221, 1225 (9th Cir.), cert. denied, 498 U.S. 999 (1990). Moreover, debate over the scope of review applicable to laws that treat religious and secular activities differently should be ended by this Court's recent decision in *Locke v. Davey*, 124 S. Ct. 1307 (2004), in which the Court held that a state statute barring scholarship aid for theology students is subject to only "rational-basis scrutiny" under the Equal Protection Clause. See *id.* at 1312 n.3. Curiously, the petition in this case was filed more than a month after *Locke* was decided; and yet petitioners say nothing about that case.[4]

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[4] Since the petition was filed, the Eleventh Circuit has invalidated a zoning provision that treated religious assemblies differently from secular ones under RLUIPA's section 2(b). See *Midrash Sephardi, Inc. v. Town of Surfside*, No. 03-13858, 2004 WL 842527 at *22 (11th Cir. April 21, 2004). The court added that section 2(b), in its view, codified constitutional standards. See *id.* at *14 ("unequal treatment indicates the ordinance improperly targets the religious character of an assembly," requiring strict scrutiny); *id.* at *20 ("government action that specifically targets religion or religious conduct for distinctive treatment can be an impermissible intrusion on an individual's free exercise rights"). Petitioners, however, do not seek review of the Seventh Circuit's rejection

Petitioners claim that the decisions in *Cornerstone* and *Congregation Kol Ami* support some form of heightened scrutiny for their equal protection claim. That view is meritless. In *Cornerstone*, a church challenged a zoning law that excluded churches from the central business district. The Eighth Circuit began its analysis of the church's equal protection claim with the observation that "we must consider whether the City has a rational basis to differentiate between the Church and the entities it permits in the C-3 zone." 948 F.2d at 471. The court held that the exclusion of churches, while allowing other non-commercial uses, was not rationally related to the objective of accommodating liquor licensees, which were not allowed in residential districts, because some of the other non-commercial uses allowed did not have liquor licenses. See *ibid.* The claim was remanded so that the city could "provide the rational basis for this apparent unequal treatment of similarly situated entities." *Ibid.* Petitioners emphasize the court's statement that the zoning restriction "must be relevant" to the city's objectives (see Pet. 11), but that is merely another formulation of rational basis scrutiny.

Similarly, in *Congregation Kol Ami*, a synagogue challenged a zoning law that restricted religious land use in a residential district, and the Third Circuit applied what it characterized as a "very forgiving standard of review" (309 F.3d at 135), acknowledging that, under *Cleburne*, "absent . . . animus or other improper motive, a land use ordinance will typically be upheld." *Ibid.* The court held that it was rational to draw distinctions between churches and a number of other uses, like kennels, riding academies, and outdoor recreation facilities, which are low-intense uses of land, and held only that it might be irrational to treat a large church differently than a full-scale country club. See *id.* at 136-42.

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of their section 2(b) claim. In any event, like the petition, the Eleventh Circuit's view of appropriate equal protection review in *Midrash Sephardi* fails to take account of *Locke*.

Nor did the Fourth Circuit apply heightened scrutiny in *Marks v. City of Chesapeake*, 883 F.2d 308 (4th Cir. 1989), which petitioners also cite. In that case, there was evidence that the city council was motivated by animosity expressed by residents when it denied a conditional use permit for the operation of a palmistry and fortune-telling business. See *id.* at 311-12. The decision applied no form of heightened scrutiny, but instead turned on the settled principle that "government officials simply cannot act solely in 'reliance on public distaste for certain activities, instead of on legislative determinations concerning public health and safety [or otherwise] dealing with zoning.'" *Id.* at 311 (citation omitted). Where such officials base their actions on animus toward a politically unpopular group, they act "'arbitrarily' and 'capriciously.'" *Ibid.* In this case, as we explain above, there is no claim that the Chicago Zoning Ordinance reflects animosity toward religion.

5. Even petitioners do not doubt that under rational basis review, Chicago's zoning ordinance easily passes muster. To begin with, the overall zoning system, which divides the City into districts and designates compatible uses for each district, has long been recognized as a legitimate way to regulate land use. See, *e.g.*, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). And in determining where churches fit into such a zoning scheme, Chicago's zoning ordinance recognizes that churches are unlike any other use, requiring unique opportunities for prayer, quiet reflection, and worship, that are not comparable to any secular assembly use. This makes religious land use readily distinguishable from secular uses of land. Cf. *Locke*, 124 S. Ct. at 1313 ("the subject of religion is one . . . that find[s] no counterpart with respect to other callings or professions"). The ordinance also fosters the important role that churches play in community life by allowing churches the unconditional right to locate in R districts, while further allowing the ZBA to grant special use permits for church use in most B and C districts, when the

church will fit among the particular business and commercial uses there. Although churches are not allowed in C4 and M districts, that is because they are too likely to be incompatible with the transportation and manufacturing uses there, which create noise, dust, and traffic that may be disruptive to church activities, and which may ultimately lead to friction between potentially incompatible uses. Whether a particular church claims to be indifferent to these neighborhood realities is not important. Under rational basis review, a municipality is entitled to legislate based on the possibility that church leaders, once permitted to locate in a commercial, manufacturing, or business district, may subsequently decide to agitate for a reduction in incompatible uses nearby, or that existing or proposed manufacturing uses might not want to invest in a location where this kind of risk to their investment is present. Either way, it is at least plausible that locating a church in a manufacturing district will produce exactly the clash of land uses that zoning is designed to avoid.

6. Petitioners claim that "if something more than bare rational basis review is applied here," the zoning ordinance impermissibly discriminates between religious and some secular assembly uses—including community centers, meeting halls, lodges, restaurants, art galleries, theaters, taverns, funeral parlors, universities, music schools, and community homes. See Pet. 15. As for clubs, lodges, community centers, and meeting halls, the zoning ordinance was amended in 2000 to place the same restrictions on those uses in B, C, and M districts, and for that reason the court of appeals found that petitioners' challenge to the earlier version of the ordinance is moot. See Pet. App. 14a-15a n.6. Although petitioners assert that their claim for damages under the old ordinance is not moot (see Pet. 5 n.2, 15), they have waived any challenge to the mootness holding below by not questioning that holding in the questions that they present in their petition for

certiorari. Arguments not fairly included in the questions presented are waived. See this Court's Rule 14.1(a).[5]

Waiver aside, the former version of the zoning ordinance survives equal protection review. As we explain above, churches are unlike any other secular assembly use in that they alone are dedicated to providing regular opportunities for quiet reflection, worship, and prayer. They therefore present greater potential for conflict with other uses in commercial, manufacturing, and business districts than do secular assembly uses. Moreover, no secular assembly use may locate in R districts, while religious land use receives this special dispensation.

And as for the remaining secular assembly uses, there is an eminently rational basis for the distinctions drawn by Chicago's ordinance. Most secular assembly uses are commercial, involving the sale of goods and services in some

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[5] In any event, the court of appeals correctly held that the damages claims are moot. When a challenged law impermissibly discriminates between a favored and a disfavored class, that discrimination may be remedied "either by extending benefits to the previously disfavored class or by denying benefits to both parties." *Orr v. Orr*, 440 U.S. 268, 272 (1979). Accord, *e.g.*, *Heckler v. Mathews*, 465 U.S. 728, 738 (1984); *Califano v. Westcott*, 443 U.S. 76, 89-91 (1979). Accordingly, when fashioning a remedy for improper discrimination, a court should determine whether the legislature would have intended that the benefit be extended to or withdrawn from all who are similarly situated. See, *e.g.*, *Mathews*, 465 U.S. at 739 n.6; *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142, 152-53 (1980); *Westcott*, 443 U.S. at 94. In this case, the City Council's preference is clear. In February 2000, the zoning ordinance was amended to withdraw from secular assembly uses any entitlements not also available to churches rather than expand churches' rights to locate in commercial areas. Given this intent, there is no basis for a damages remedy for plaintiffs' inability to locate as a matter of right in nonresidential districts prior to February 2000. After all, damages cannot be awarded absent proof of an actual loss caused by a constitutional violation. See, *e.g.*, *Memphis Community School District v. Stachura*, 477 U.S. 299, 308 (1986).

respect, or at least tend to invite traffic that may cross over and patronize other commercial uses in an area. As for labor organization offices, these facilities are a good fit in M districts for another reason—it makes sense to allow such offices close to the manufacturers where members of labor organizations often work. The zoning ordinance is a carefully crafted scheme, designed to ensure that all land uses fit together in one harmonious whole; the treatment of religious land use under Chicago's zoning ordinance is rational and, indeed, generous.

II. THE CONFLICT AMONG THE CIRCUITS ABOUT THE CONTOURS OF HYBRID RIGHTS PROVIDES NO BASIS FOR PLENARY REVIEW.

In *Smith*, the Court noted that in a few earlier cases, even neutral laws of general applicability were held unconstitutional when they "involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . ., or the right of parents . . . to direct the education of their children . . . ." 494 U.S. at 881. Petitioners note a conflict among the circuits about whether a plaintiff can elevate scrutiny of a free exercise claim by coupling it with another constitutional claim. See Pet. 16-19. That conflict, however, provides no basis for plenary review in this case.

1. Petitioners have waived a hybrid rights claim because it is not fairly included in the questions presented in the petition for certiorari. Petitioners' first question presented concerns only the Equal Protection Clause, and their second concerns the nature of a "substantial burden" within the meaning of the Free Exercise Clause and RLUIPA. While an issue may be fairly included in a question presented if it is a "'predicate to intelligent resolution' of the question on which we granted certiorari" (*Vance v. Terrazas*, 444 U.S. 252, 258-59 n.5

(1980)), resolving the conflict pertaining to hybrid rights is not a predicate to the resolution of either of the questions presented.

2. Waiver aside, the conflict petitioners identify does not extend to a case like this one, where the free exercise claim is brought in tandem with the equal protection claim—the only companion constitutional claim that petitioners press in their petition for certiorari. Petitioners identify no case imposing heightened review of a free exercise claim based solely on a companion equal protection claim. *Smith* itself refers only to cases asserting affirmative constitutional entitlements, such as the right to free speech or to raise one's children free from undue governmental interference. See 494 U.S. at 882. Most of the cases in which courts have discussed hybrid rights that support heightened scrutiny of a free exercise claim have involved constitutional entitlements, such as free speech. See, *e.g.*, *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1285, 1290 (10th Cir. 2004); *Thomas v. Anchorage Equal Rights Commission*, 165 F.3d 692, 707-11 (9th Cir. 1999), vacated as unripe, 220 F.3d 1134 (2000) (en banc); *Cornerstone*, 948 F.2d at 468-71. But an equal protection claim asserts no substantive constitutional entitlement and accordingly adds nothing to a free exercise claim. Indeed, there is no conflict in the circuits on whether some form of heightened scrutiny is required when a Free Exercise Clause claim is made in conjunction only with an equal protection claim. Nor is a conflict likely to develop in light of this Court's recent decision in *Locke* holding that when a Free Exercise Clause claim lacks merit, a companion equal protection claim requires only rational basis review. See 124 S. Ct. at 1312 n.3.

3. This is not the appropriate case to resolve the conflict about how to treat a hybrid rights claim because petitioners' claim flounders under any of the approaches the courts of appeals have taken.

The Second and Sixth Circuits have rejected the idea of a hybrid rights claim that makes the level of scrutiny of a free exercise claim vary simply because another constitutional right is implicated. See, *e.g.*, *Leebaert v. Harrington*, 332 F.3d 134, 143-44 (2d Cir. 2003); *Kissinger v. Board of Trustees*, 5 F.3d 177, 180 (6th Cir. 1993).[6] In the decision below, the Seventh Circuit joined the First and Third Circuits in holding that the concept of hybrid rights entitles a plaintiff to heightened review under the Free Exercise Clause of a neutral law of general applicability only if the plaintiff also establishes that some other constitutionally protected interest is infringed by the challenged law. See Pet. App. 19a; *Tenafly Eruv Association v. Borough of Tenafly*, 309 F.3d 144, 165 & n.23 (3d Cir. 2002), cert. denied, 123 S. Ct. 2609 (2003); *Brown v. Hot, Sexy & Safer Products, Inc.*, 68 F.3d 525, 539 (1st Cir. 1995), cert. denied, 516 U.S. 1159 (1996).[7] There is no meaningful difference between these two approaches, since neither calls for heightened scrutiny merely because a free exercise claim is conjoined with some other asserted constitutional violation.

Petitioners rely on statements of the Ninth and Tenth Circuits that a plaintiff can obtain heightened scrutiny under the Free Exercise Clause if he asserts a "colorable" companion

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[6] This appears to be Justice Souter's view as well. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 566-67 (1993) (Souter, J., concurring in part and concurring in the judgment). Similarly, the separate opinion in *Smith* rejected the concept of hybrid rights, and took pains to note that the cases the majority had characterized as involving hybrid rights invalidated laws only after concluding that they placed undue burdens on religiously motivated conduct. See 494 U.S. at 894-97 (O'Connor, J., concurring in the judgment).

[7] This approach is faithful to *Smith*. In that case, as we explain above, the Court invoked the concept of hybrid rights to explain decisions in which a free exercise claim received heightened scrutiny because a challenged law impinged upon other "constitutional protections" in addition to imposing a burden on religiously motivated conduct. See 494 U.S. at 881.

claim under the Constitution. See *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999); *Thomas*, 165 F.3d at 705-06; *Swanson v. Guthrie Independent School District No. I-L*, 135 F.3d 694, 700 (10th Cir. 1998). At least one indication that this asserted conflict lacks substance is that the Seventh Circuit itself perceived no difference between its position and that of the Ninth and Tenth circuits. See Pet. App. 19a.

And the Seventh Circuit is correct on this score. Although a hybrid rights claim will receive heightened scrutiny based on a "colorable" companion claim that is conjoined with a free exercise claim in the Ninth and Tenth Circuits, the standard for a "colorable" claim in those circuits is far from minimal. As the Ninth Circuit observed in *Thomas*, "the mere fact that a companion right is 'implicated' cannot serve as the touchstone for heightened scrutiny." 165 F.3d at 704. Rather, the plaintiff must prove a "likelihood of success on the merits" on the companion claim before the level of scrutiny will be raised on a free exercise challenge. *Id.* at 706. Accord *Axson-Flynn*, 356 F.3d at 1297. Accordingly, petitioners cannot prevail even under the view taken by the Ninth and Tenth Circuits, for they have no colorable companion claim as those circuits have defined that concept. To the contrary, petitioners' free speech, free assembly, equal protection, and due process claims have been fully litigated and decided against them. See Pet. App. 20a-24a.[8]

Finally, even if petitioners could show a likelihood of success on some companion claim, it would not advance the ball very far for them. A plaintiff who successfully invokes hybrid rights must then show "whether the government has

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[8] The supposed conflict over hybrid rights claims also has little practical significance. As the California Supreme Court recently observed, despite the varying formulations of the hybrid rights concept that have been employed, no court has ever relied on that theory to grant relief or even to apply strict scrutiny. See *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 87-88 (Cal. 2004).

placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." *Thomas*, 165 F.3d at 711 (quoting *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989)). The court of appeals held, however, that the Chicago Zoning Ordinance imposed no substantial burden on religious belief. See Pet. App. 13a-15a. And as we now explain, the court of appeals' holding on that point also does not merit plenary review.

III. A ZONING ORDINANCE THAT LEAVES OPEN REASONABLE LOCATION OPPORTUNITIES FOR A CHURCH IMPOSES NO SUBSTANTIAL BURDEN ON RELIGION.

Petitioners claim that the Chicago Zoning Ordinance imposes a substantial burden on religion within the meaning of this Court's decisions under the First Amendment's Free Exercise Clause and section 2(a) of RLUIPA. See Pet. 19, 25. The court of appeals rejected this argument, concluding that the record shows only that the zoning ordinance imposes the type of regulatory and financial burdens typical of zoning regulation. See Pet. App. 13a-14a. Plenary review of this fact-bound holding is not warranted.

1. Petitioners take issue with the Seventh Circuit's formulation of the substantial burden test and argue that there is a split in authority about what amounts to a substantial burden. See Pet. 19. Although the circuits have used various formulations to describe what amounts to a substantial burden, see Pet. 23-24, these are but minor variations in the way the substantial burden test has been articulated, and reflect no great divide on the issue. In fact, whether addressing claims under the Free Exercise Clause or RLUIPA, the courts of appeals have uniformly rejected claims that land-use regulations impose a substantial burden on religion when they leave open reasonable opportunities to locate a

church or other religious facility, even if they add expense and inconvenience to the search for an appropriate location. See, *e.g.*, *Midrash Sephardi, Inc. v. Town of Surfside*, No. 03-13858, 2004 WL 842527 at *9-10 (11th Cir. Apr. 21, 2004) (finding no substantial burden under RLUIPA where church claimed that a church in the residential area would be too inconvenient for church members); *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1033-35 (9th Cir. 2004) (finding no substantial burden under RLUIPA on a religious college where there was "no evidence in the record demonstrating that College was precluded from using other sites within the city"); *Christian Gospel Church*, 896 F.2d at 1224 (rejecting free exercise claim because the city's refusal to grant a conditional use permit imposed merely a burden "of convenience and expense, requiring [the church] to find another home or another forum for worship"); *Rector, Wardens, and Members v. City of New York*, 914 F.2d 348, 353-56 (2d Cir. 1990) (landmark commission's refusal to permit new development on landmarked property imposed no substantial burden even though it deprived church of substantial revenue), cert. denied, 499 U.S. 905 (1991); *Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820, 824-26 (10th Cir. 1988) (rejecting free exercise claim where churches were permitted in thirteen of sixteen residential districts, and holding that "the financial consequences to the church do not rise to infringement of religious freedom"), cert. denied, 490 U.S. 1005 (1989); *Grosz v. City of Miami Beach*, 721 F.2d 729, 740 (11th Cir. 1983) (rejecting free exercise claim because zoning ordinance would permit religious activities in half the city's territory); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303, 307 (6th Cir.) (zoning law that allowed worship in any existing building and construction of a church building in 10% of the city did not substantially burden church even if available lots "may not meet [the church's] budget or satisfy its tastes"), cert. denied,

464 U.S. 815 (1983); *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. City of West Linn*, 86 P.3d 1140, 1156-57 (Or. Ct. App. 2004) (rejecting RLUIPA challenge to denial of conditional use permit where church was able to meet elsewhere without unreasonable expense or inconvenience); *North Pacific Union Conference Association v. Clark County*, 74 P.3d 140, 146-47 (Wash. Ct. App. 2003) (upholding, under RLUIPA and Free Exercise Clause, denial of special use permit in agricultural district); *City of Colorado Springs v. Blanche*, 761 P.2d 212, 216-17 (Colo. 1988) (en banc) (upholding ordinance confining religious land use to specified zoning districts); *Minney v. City of Asuza*, 330 P.2d 255, 261-63 (Cal. Ct. App. 1958) (upholding ordinance excluding churches from most of the city).

Petitioners contend that a more lenient standard is found in the Tenth Circuit's decision in *Thiry v. Carlson*, 78 F.3d 1491 (10th Cir.), cert. denied 519 U.S. 821 (2003). There, the plaintiffs claimed that the state's condemnation of their daughter's gravesite in order to build a highway substantially burdened their religion in violation of RFRA because the site had special spiritual meaning and was often used for prayer. See *id.* at 1493. The court concluded that the condemnation would not substantially burden religion because "[w]hile the Thirys establish that they will be both distressed and inconvenienced over the relocation of their daughter's gravesite and loss of access to that particular site itself, they also testified that they will still continue their religious beliefs and practices even if the condemnation proceeds as planned." *Id.* at 1495. The court also noted that the plaintiffs "have worshiped, prayed, and drawn near to God in places other than the gravesite area." *Ibid.* This analysis, emphasizing the existence of reasonable opportunities to worship despite a governmental action restricting the use of one location, reflects no meaningful difference from the approach of other circuits.

Islamic Center of Mississippi, Inc. v. City of Starkville, 840 F.2d 293 (5th Cir. 1988), is not indicative of a circuit split either. That case turned on evidence that the city's decision to deny a permit for a religious center at a particular location was based on an animosity toward the Islamic faith. Thus, "the City did not act in a religiously neutral manner." *Id.* at 302. The Free Exercise Clause forbids laws that discriminate against particular religions or sects. See, *e.g.*, *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 535-40 (1993). But in this case, petitioners challenge Chicago's zoning ordinance on its face, and the ordinance treats all religions evenhandedly. Nor is there any claim that "the object of [this] law is to infringe upon or restrict practices because of their religious motivation . . . ." *Id.* at 533. Even petitioners do not doubt that the object of Chicago's ordinance is to promote harmonious land use.

Nor is there any inconsistency between the Seventh Circuit's decision and *First Covenant Church v. City of Seattle*, 840 P.2d 174 (Wash. 1992). In that case, the court held that a landmark ordinance "so grossly diminishes the value of the Church's principal asset that it impermissibly burdens First Covenant's right to free exercise of religion." *Id.* at 184.[9] There is no comparable evidence in this case of the financial impact of Chicago's ordinance on petitioners.

In short, there is no conflict in the lower courts on the question whether a zoning law that directs churches to residential zoning districts imposes an impermissible burden on religion.[10]

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[9] In *First Covenant Church*, moreover, the court based its decision on the state's constitution which, the Court observed, provided greater protection than the Free Exercise Clause. See 840 P.2d at 185-88.

[10] Petitioners make brief reference to the individualized exemptions doctrine that sometimes triggers strict scrutiny of challenged laws under the Free Exercise Clause. See Pet. 23-24 n.8. Neither of the questions

2. The court of appeals' decision faithfully adheres to this Court's free exercise jurisprudence. This Court has long recognized that government action does not substantially burden religion merely because it imposes costs on religious organizations or groups. See, *e.g.*, *Smith*, 494 U.S. at 889; *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378, 390 (1990); *Hernandez*, 490 U.S. at 699. Nearly all government regulation imposes some sort of cost; that does not make it impermissible or even suspect.

This Court has found challenged laws to impose a substantial burden on religious exercise only when the law has a coercive effect by forcing a litigant to surrender his religious beliefs or else face the loss of an important government benefit. See, *e.g.*, *Smith*, 494 U.S. at 883-84.[11] In *Sherbert v. Verner*, 374 U.S. 398 (1963), for example, the denial of unemployment benefits because the plaintiff refused to work on Saturday in violation of her religious beliefs plainly had a "tendency to inhibit constitutionally protected activity." *Id.* at

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presented in the petition encompasses this doctrine, however, and hence petitioners have waived reliance on it. In any event, that doctrine provides only that "where the state has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Smith*, 494 U.S. at 884. Here, there is no claim that Chicago will not entertain a claim of religious hardship when evaluating an application for rezoning or a special use. Moreover, even petitioners acknowledge that this doctrine requires strict scrutiny only "if a substantial burden can be shown." Pet. 23 n.8. Accordingly, even if there is a conflict in the lower courts on the reach of the individualized exemptions doctrine, it is immaterial to this case because Chicago's ordinance imposes no substantial burden.

[11] Even the separate opinion in *Smith* acknowledged that an impermissible burden on religion is only one that is "imposed directly through laws that prohibit or compel specific religious practices, or indirectly through laws that, in effect, make abandonment of one's own religion or conformity to the religious beliefs of others the price of an equal place in the civil community." 494 U.S. at 897 (O'Connor, J., concurring in the judgment).

404-06 & n.6. Similarly, in *Thomas v. Review Board*, 450 U.S. 707 (1981), the plaintiff's choice between participating in the production of weapons in violation of his religious beliefs or receiving unemployment benefits had a "coercive impact" that put "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Id.* at 717. Chicago's zoning ordinance applies no comparable pressure to abandon religious beliefs or practices. If it were not plain enough from the zoning ordinance itself, experience shows that the City's zoning scheme, which has been in place since 1957, does not inhibit religion. Thousands of churches have found homes within Chicago. Indeed, each of the five individual petitioners has successfully located in Chicago, either as of right in an R district or by a special use permit for a B or C district.

Indeed, this Court has determined that the incidental impact on religion posed by zoning ordinances like the City's falls so far short of a substantial burden that it dismissed a similar case for lack of a substantial federal question. In *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville*, 203 P.2d 823 (Cal. Ct. App.), appeal dismissed, 338 U.S. 805 (1949), the California Appellate Court rejected free exercise and due process challenges to an ordinance that permitted churches only in the most intensive of the municipality's four zoning classifications, and this Court found no substantial federal question to be presented. As this Court shortly thereafter explained its ruling:

> When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the Nation is an absurdity. We recently dismissed for want of substantiality an appeal in which a church group

> contended that its First Amendment rights were violated by a municipal zoning ordinance preventing the building of churches in certain residential areas.

American Communications Association v. Douds, 339 U.S. 382, 397 (1950). This is an even easier case than *Corporation of Presiding Bishop* because Chicago's zoning ordinance allows churches in all residential areas by right and in other areas if they obtain special use permits—far more land, and more desirable land, than was available in *Corporation of Presiding Bishop*.

In short, what petitioners complain about here cannot fairly be characterized as a "substantial burden" on religion, but only an obstacle to obtaining whatever property the church prefers—for reasons of cost, convenience, or anything else. Neither the Free Exercise Clause nor RLUIPA frees churches from reasonable zoning restrictions. All zoning laws restrict land use choices in order to promote harmonious land use, and there is nothing impermissible about that kind of burden.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CHRIST CENTER, CHRISTIAN COVENANT OUTREACH CHURCH, HIS WORD MINISTRIES TO ALL NATIONS, CHRISTIAN BIBLE CHURCH, MONTE DE SION (MOUNT ZION) CHURCH, AND CIVIL LIBERTIES FOR URBAN BELIEVERS,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF CERTIORARI

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF IN SUPPORT OF CERTIORARI	1
I. THE FIRST QUESTION WARRANTS REVIEW, ALONG WITH THE INCLUDED QUESTION ABOUT THE STATUS OF "HYBRID RIGHTS"	1
II. THE SECOND QUESTION DEMANDS REVIEW	6
CONCLUSION	10

TABLE OF AUTHORITIES

CASES Page

Able v. *United States*, 155 F.3d 628 (2d Cir. 1998) 2
American Communications Ass'n v. *Douds*, 339 U.S. 382 (1950) 10
Celotex, Corp. v. *Catrett*, 477 U.S. 317 (1986) 3
City of Cleburne v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) 1, 2
Congregation Kol Ami v. *Abington Township*, 309 F.3d 120 (3d Cir. 2002) 2
Cornerstone Bible Church v. *City of Hastings*, 948 F.2d 464 (8th Cir. 1991) 2, 6
Corporation of Presiding Bishop v. *City of Porterville*, 203 P.2d 823 (Cal. Ct. App.), *appeal dismissed*, 338 U.S. 805 (1949) 10
Eastman Kodak Co. v. *Image Tech. Servs., Inc.*, 504 U.S. 451 (1992) 3, 9
Employment Div. v. *Smith*, 494 U.S. 872 (1990) 3, 5, 10
FCC v. *Beach Communications, Inc.*, 508 U.S. 307 (1993) 2
First Covenant Church v. *City of Seattle*, 840 P.2d 174 (Wash. 1992) 8
Islamic Ctr. of Miss., Inc. v. *City of Starkville*, 840 F.2d 293 (5th Cir. 1988) 8, 9
Locke v. *Davey*, 124 S. Ct. 1307 (2004) 3
Midrash Sephardi v. *Town of Surfside*, __ F.3d __, 2004 WL 842527 (11th Cir. Apr. 21, 2004) .. 6
Milner v. *Apfel*, 148 F.3d 812 (7th Cir. 1998) 2
Romas v. *Town of Vernon*, 353 F.3d 171 (2d Cir. 2003) 2
Sherbert v. *Verner*, 374 U.S. 398 (1963) 9, 10
Thiry v. *Carlson*, 78 F.3d 1491 (10th Cir. 1996) 7
Thomas v. *Review Bd.*, 450 U.S. 707 (1981) 10
United States v. *Lee*, 455 U.S. 252 (1982) 3

TABLE OF AUTHORITIES—continued

	Page
Vance v. *Terrazas*, 444 U.S. 252 (1980)	10
Virginia Bankshares, Inc. v. *Sandberg*, 501 U.S. 1083 (1991)	5

RULES

Fed. R. Civ. P. 56(c)	3
Sup. Ct. R. 14.1(a)	5

REPLY BRIEF IN SUPPORT OF CERTIORARI

Respondent's opposition merely reinforces the conclusion that the issues presented in the petition merit this Court's review. Respondent, for example, nowhere disputes the vital practical importance of these issues to American religious life and, indeed, to zoning bodies throughout the Nation—a point emphasized in the two *amicus* briefs from religious organizations supporting petitioners, see Br. of American Jewish Congress *et al.*; Br. of the Becket Fund for Religious Liberty *et al.* Even more important, respondent admits that the federal courts of appeals and highest state courts are divided on the issues raised by the petition. Although respondent seeks to minimize these conflicts by arguing that they are "minor," Opp. 6, 21, it does not and cannot deny that the conflicts are real. And respondent's argument that resolution of these conflicts could have no effect in this case—or other cases around the country—improperly assumes that a jury would believe the evidence presented by respondent, who won summary judgment below, rather than the extensive, contrary evidence presented by petitioners.

I. THE FIRST QUESTION WARRANTS REVIEW, ALONG WITH THE INCLUDED QUESTION ABOUT THE STATUS OF "HYBRID RIGHTS."

1. Respondent utterly fails to undermine petitioners' showing—recognized by Judge Posner below—that this case creates a square conflict in the circuits about whether religious (and other "sensitive") land uses are entitled to some degree of heightened review that is "more alert for unjustifiable discrimination" than bare rational basis review, in light of *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985). Pet. App. 26a-28a; see Pet. 10-19. Respondent's argument that *Cleburne* applied nothing more than ordinary rational basis review is flatly contradicted, not only by the analysis in that decision as explicated by Judge Posner, but also by *Cleburne*'s separate opinion, which noted without

contradiction: "[H]owever labeled, the rational-basis test invoked today is most assuredly not the [ordinary] rational-basis test." *Cleburne*, 473 U.S. at 458 (Marshall, J., concurring in judgment in part and dissenting in part). Respondent's interpretation of *Cleburne* is also rejected by numerous circuit court opinions recognizing that *Cleburne* applied a more rigorous version of rationality review. See, *e.g.*, *Romas* v. *Town of Vernon*, 353 F.3d 171, 175 (2d Cir. 2003); *Able* v. *United States*, 155 F.3d 628, 634 (2d Cir. 1998); *Milner* v. *Apfel*, 148 F.3d 812, 816-17 (7th Cir. 1998).

Respondent also fails in its attempt to escape Judge Posner's conclusion that the decision below conflicts with the decisions of other courts of appeal in the land-use context. See Pet. App. 26a, 28a; Pet. 11-13. For example, as we explained in the petition (at 11)—and as respondent does not dispute—the Eighth Circuit in *Cornerstone Bible Church* v. *City of Hastings*, 948 F.2d 464, 471 (8th Cir. 1991), relying upon *Cleburne*, imposed on the *government* the burden of establishing the rationality of any differential treatment between churches and non-commercial assembly uses. This of course is a departure from the usual rule that, where rational-basis review applies, the *plaintiff* bears the burden of demonstrating the irrationality of the differences. *E.g.*, *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) ("[T]hose attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it.") (internal quotation marks omitted). Here, in a clear departure from both *Cleburne* and *Cornerstone*, the Seventh Circuit placed this burden squarely on petitioners' shoulders. Pet. App. 22a-23a.

Respondent likewise fails to rebut the conclusion that the decision below conflicts with the Third Circuit's decision in *Congregation Kol Ami* v. *Abington Township*, 309 F.3d 120 (3d Cir. 2002). There, not only did the court direct that the government would bear the burden of justifying any proven differences in treatment between religious and non-religious

uses (the subject of the court's remand), but it also held that the level of scrutiny must depend upon the magnitude of the difference: "as the similarity of use wanes, so too the inequality in treatment will be increasingly tolerated." *Id.* at 142. Thus, Judge Posner was clearly correct in concluding that the decision below conflicts with both *Kol Ami* and *Cornerstone*.[1]

2. Respondent also errs in suggesting that resolution of this issue in petitioners' favor would not affect the outcome here. Because respondent was granted summary judgment in the district court, reversal is now required if—evaluated under the correct legal standard for the equal protection challenge in this case—there is any genuine issue of material fact. Fed. R. Civ. P. 56(c); *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323 (1986). Further, because summary judgment was granted against petitioners, under well-established standards, petitioners' "version of any disputed issue of fact . . . is presumed correct" and "'all justifiable inferences are to be drawn in [petitioner's] favor.'" *Eastman Kodak Co.* v. *Image Tech. Servs., Inc.*, 504 U.S. 451, 456 (1992) (quoting *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

Here, petitioners presented ample evidence to defeat summary judgment under the heightened rationality standard applied in *Cleburne*, *Kol Ami*, and *Cornerstone*. To take but one striking example, respondent ignores petitioners' summary judgment affidavit from planning expert Robert Larson, which shows that churches are in fact treated worse than

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[1] Respondent's suggestion that this conflict has been resolved by *Locke* v. *Davey*, 124 S. Ct. 1307 (2004), is frivolous. *Locke*, which dealt only with public funding for the training of religious ministers, cannot reasonably be read to hold that *all* religious discrimination is subject to bare rational-basis review. And if it could, the sweeping consequences of such a conclusion would be an additional reason to grant review here. Moreover, *Employment Division* v. *Smith*, 494 U.S. 872 (1990), and *United States* v. *Lee*, 455 U.S. 252 (1982), involve free exercise challenges, not an equal protection challenge like petitioners' claim here.

similarly situated assembly uses even though they require similar property features. Reply App. 1a-5a. Specifically, many churches' needs for visibility, accessibility, and size can often be met only in commercial, business or manufacturing zones. *Id.* at 2a-3a (¶¶ 4-6). Most residential zones in Chicago fail to meet these requirements and are therefore unsuitable for many churches. *Id.* Moreover, properties in commercial or business zones used by similarly situated assembly uses—such as community centers, assembly halls, lodges, and clubs—are ideal for churches, yet churches face additional obstacles which other, non-religious assembly uses do not. See *id.* at 3a (¶ 6).[2]

Especially when this evidence is viewed in the light most favorable to petitioners—as it must be on appeal from summary judgment—it is sufficient for a reasonable jury to find that respondent's zoning scheme, both on its face and as applied, treats religious uses worse than similar non-religious uses. Under the interpretation of *Cleburne* reflected in *Kol Ami* and *Cornerstone* (and in Judge Posner's dissent), such a showing is sufficient to require something more than bare rationality review. And because respondent itself does not claim it would be entitled to summary judgment under a heightened standard, it can hardly claim that an application of that standard would make no difference here.[3]

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[2] Contrary to respondent's argument, Opp. 9-10, petitioners' evidence is also sufficient to create a material issue of fact on the kind of discrimination pointed out by Judge Posner—in favor of older religious communities and against newer ones, Pet. App. 29a. As petitioners' real estate expert made clear in an affidavit before the district court, "it is almost, if not completely, impossible to find a parcel of vacant land large enough to build a church in a residential zone." Reply App. 6a, 8a (¶¶ 7, 11). Accordingly, new churches are "categorically or discretionarily excluded" from land in the remainder of the city because "the land the Zoning Ordinance makes freely available to churches [in residential zones] is completely inadequate." *Id.* at 8a (¶ 12).

[3] Contrary to respondents' waiver argument (Opp. 7), petitioners' brief to the Seventh Circuit (at 39-44) urged that petitioners should prevail un-

3. Respondent is also incorrect in contending that the Court cannot use this case to resolve what respondent admits is a sharp conflict among the federal circuits as to the status of the "hybrid rights" doctrine alluded to in *Employment Division* v. *Smith*, 494 U.S. 872, 881-82 (1990). The first question presented asks "whether an equal protection challenge to a land-use regulation implicating uses protected by the First Amendment, such as religious uses, must be analyzed under the same 'rational basis' scrutiny as economic regulations implicating no fundamental rights." Pet. (i). Judge Posner's interpretation of *Cleburne* provides one obvious way of answering that question in the negative. But so does the hybrid rights approach: The addition of a colorable equal protection claim to a colorable free-exercise challenge results in a claim that is, at least in part, an "equal protection challenge" within the meaning of the first question presented. And if the hybrid-rights approach is valid, then it too provides an independent basis for a negative answer to that question. The hybrid-rights point is, therefore, "fairly included" in the first question presented. See Sup. Ct. R. 14.1.[4]

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der *both* "strict scrutiny" and rigorous rationality review of the kind employed in *Cleburne*, *Kol Ami* (then at the district court) and *Cornerstone*. Petitioners then reiterated this argument in a 28(j) letter, explicitly addressing whether "'*Cleburne* is more exacting than the standard version' of rational-basis scrutiny" and repeating that treating similar assembly uses differently fails the "more precise [rational basis] requirement in *Cleburne*." Pet. 28(j) Ltr. 1 (Jan. 28, 2003). In all events, this issue was squarely decided by the court below. *See, e.g.*, *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) ("It suffices for our purposes that the court below passed on the issue presented . . . .").

Moreover, respondent's argument that petitioners' challenge to the earlier version of the ordinance is moot ignores the fact that damage claims remain as to that version, as we explained in the petition. *See* Pet. 5 n.2.

[4] Respondent is also wrong in contending that there is "no meaningful difference," Opp. 19, between the Ninth and Tenth Circuits' "colorability" standard for companion clams to support a hybrid rights challenge, *see* Pet. 18-19 (citing cases), and other circuits that either have rejected hybrid rights outright or demanded that the companion claim be fully meritorious

II. THE SECOND QUESTION DEMANDS REVIEW.

Respondent has also failed to rebut our showing that the second question presented—the proper application of the "substantial burden" concept—is the subject of a square conflict and thus requires review by this Court.

1. As demonstrated in our petition, a conflict currently exists between courts which, like the Seventh Circuit, would require religious practice to be rendered essentially impossible—*i.e.*, "effectively impracticable"—to create a substantial burden, and those that take a more moderate position, in keeping with the Court's *Sherbert* line of cases, that a tendency to coerce or a significant increase in the cost of religious observance is sufficient. See Pet. 19-25. Since the petition was filed, that split has become even more pronounced, with the Eleventh Circuit expressly "declin[ing] to adopt the Seventh Circuit's definition" of substantial burden. *Midrash Sephardi, Inc.* v. *Town of Surfside*, ___ F.3d ___, 2004 WL 842527, at *9 (11th Cir. Apr. 21, 2004). Instead, the Eleventh Circuit looked to the *Sherbert* line of cases, and held that a substantial burden merely "requires something more than an incidental effect on religious exercise," such as "pressure that tends to force adherents to forego religious precepts." *Id.*

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on a freestanding basis, *see id.* at 16-17 (citing cases). Contrary to respondent's suggestion, Opp. 20, the Seventh Circuit did not find that the Ninth and Tenth Circuits' approach was identical to its own. The Seventh Circuit simply ignored the conflict. This difference in standards is important given Judge Posner's correct conclusion that there is sufficient evidence to establish an equal protection violation, which can serve as a "companion" to petitioners' free-exercise claim. *See* Pet. 19.

Respondent's assertions that an equal protection challenge cannot be the predicate for a hybrid rights claim is likewise incorrect. Although *Smith* cited the most common companion claims—free speech and the right to direct the education of one's children—it did not close the door to a hybrid rights claim based on the Equal Protection Clause. And, *Cornerstone* recognized that a hybrid rights claim could be based on a companion equal protection challenge. *See* 948 F.2d at 473.

Implicitly recognizing this conflict, respondent concedes that "the circuits have used various formulations to describe what amounts to a substantial burden." Opp. 21. Respondent focuses instead on the unsurprising fact that—as would be expected from a "substantiality" standard—some plaintiffs cannot make out a case for substantial burden even under the lower standard. See *id.* at 21-23. But even if the outcome is the same under different standards in the circumstances of certain cases, that does not show that the legal standards are the same, much less that a different standard would not have mattered here. That difference is dispositive.[5] See *infra*.

2. Respondent's effort to distinguish the decisions that conflict most obviously with the decision below is as unpersuasive as it is irrelevant. For example, respondent does not dispute that the standard articulated by the Tenth Circuit is *not* whether religious exercise is rendered "effectively impracticable"—the Seventh Circuit's standard—but whether the burden is one that would "significantly inhibit or constrain," "meaningfully curtail" or deny "reasonable opportunities" for religious practice, that is, whether the burden has a "'*tendency* to coerce individuals into acting contrary to their religious beliefs.'" *Thiry* v. *Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996) (emphasis added) (quoting *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988)). Contrary to respondent's suggestion, it makes no difference that the particular burden there—relocating a grave site to make way for a highway project—ultimately was not found to meet this standard on the record presented there.

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[5] Respondent also attempts to avoid this conflict by recasting the question presented, contending that "there is no conflict in the lower courts on the question whether a zoning law that directs churches to residential zoning districts imposes an impermissible burden on religion." Opp. 24. But the question presented in the petition turns not on the outcome of the application of the standard to a given set of facts, but on whether the circuits (and states' highest courts) employ different standards and what that standard should be. As to this question, respondent acknowledges as it must that these courts have used "various formulations." *Id.* at 21.

Nor can respondent avoid the Fifth Circuit's decision in *Islamic Center of Mississippi, Inc.* v. *City of Starkville*, 840 F.2d 293 (5th Cir. 1988), by attempting to cabin it as a mere discrimination case. That court concluded that zoning laws—such as the one here—that make religious assemblies "relatively inaccessible within the city limits" and thereby ensure that "churches, synagogues, and mosques [become] accessible only to those affluent enough to travel by private automobile," create an "obvious[] burden [on] the exercise of religion by the poor," *id.* at 299, regardless of whether religious practice is rendered virtually impossible. The fact that the court in *Starkville* also found evidence of discrimination does not undermine its holding, in square conflict with the decision below, that a burden need not make religious exercise impossible to be considered "substantial." *Id.* at 299-300.

3. Respondent's half-hearted attempt to distinguish the decision of the Washington Supreme Court in *First Covenant Church* v. *City of Seattle*, 840 P.2d 174 (Wash. 1992), highlights another fundamental flaw in its opposition. Specifically, it improperly assumes that disputed factual issues are to be resolved in favor of *respondent* rather than the party against whom summary judgment was granted, *i.e.*, petitioners. See, *supra*, at 3. Respondent recognizes that the court in *First Covenant* held—contrary to the decision below—that "a *financial* burden on religious activity, if too gross, may unconstitutionally infringe on free exercise," 840 P.2d at 183 (emphasis added), even if it does not make religious observance impracticable. *Id.* at 184. Yet respondent attempts to distinguish the decision solely on the ground that "[t]here is no comparable evidence in this case of the financial impact of Chicago's ordinance on petitioners." Opp. 24.

But respondent is as wrong on that score as it is in belittling the burdens petitioners endured as merely "incidental," and thus arguing that petitioners would not benefit from a more robust definition of "substantial burden." *Id.* at 26. In fact, the record is replete with sworn evidence about the significant

burdens on petitioners and the corresponding tendency to coerce them to forgo aspects of communal worship, see Reply App. 11a-13a (¶¶ 27-28), which, as *Starkville* recognized, are fundamental to their religious practice. 840 F.2d at 300 ("[t]he assembly of a community of believers is an integral part of most religious faiths").[6]

Nor is it any answer to point to churches being "permitted uses" in residential zones. In fact, petitioners presented evidence that it is virtually impossible to find a parcel of vacant land large enough to build a church in a residential zone, Reply App. 6a-8a (¶¶ 7-11), and that, even where land is available, it does not offer the visibility and accessibility many churches need, *id.* at 2a, 3a (¶¶ 4, 6). Thus—assuming petitioners' facts as true and giving them the benefit of all reasonable inferences, *e.g.*, *Eastman Kodak Co.*, 504 U.S. at 456—there can be no doubt that a less grudging standard of "substantial burden" would make a difference here.

3. It is equally clear that petitioners' evidence, evaluated under the proper summary judgment standard, is sufficient to establish a "substantial burden" as that term has been used in decisions of this Court such as *Sherbert* v. *Verner* 374 U.S.

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[6] Petitioners presented evidence, for example, that "the Chicago Zoning Ordinance places a heavy burden on churches seeking to expand or locate a facility in the City of Chicago" and that "[t]he special use permit requirement under zoning ordinances . . . creates significant difficulties for churches" such as substantial "expense" and exposure to "religious, racial, ethnic, or socioeconomic biases." Reply App. 3a-4a (¶¶ 7-8). The evidence further shows that these burdens not only had a tendency to deter religious worship and other religious conduct, but in fact did so. For example, as a result of a two-year fight over a special use permit, Christian Bible not only "paid substantial sums in expenses," but also "suffered a decrease in membership." Pet. App. 49a. And similar evidence was offered on behalf of, among others, petitioner Monte de Sion, *id.* at 14a (¶ 11), and petitioner CLUB's member churches, *id.* at 15a (¶ 2h); *see also id.* at 16a (¶ 22) (Christian Bible). A decline in membership and attendance clearly provides a basis for a reasonable jury to conclude that those regulations have a tendency to discourage or deter religious activity, even if they do not make worship impossible.

398 (1963), and *Thomas* v. *Review Board*, 450 U.S. 707 (1981). That is because it creates a triable issue as to whether Chicago's zoning scheme has a "*tendency to inhibit* constitutionally protected activity"—in this case, communal worship. 374 U.S. at 404 & n.6 (emphasis added).

Contrary to respondent's suggestion, moreover, Opp. 26-27, nothing in *Corporation of Presiding Bishop* v. *City of Porterville*, 203 P.2d 823 (Cal. Ct. App.), *appeal dismissed*, 338 U.S. 805 (1949), or *American Communications Ass'n* v. *Douds*, 339 U.S. 382 (1950)—which preceded the *Sherbert* line of cases and RLUIPA—indicates that zoning schemes are incapable, as a matter of law, of imposing a substantial burden on religion. Certainly the lower courts that have upheld substantial burden challenges to zoning decisions have not found those decisions to be an impediment.

4. Finally, respondent is wrong in contending that the "individualized assessments" issue—as to which respondent acknowledges a conflict—is not fairly encompassed in the petition. Opp. at 24 n.10. Petitioners' second issue presented seeks clarification of the meaning of "substantial burden" under the Free Exercise Clause as well as RLUIPA. To find that the "substantial burden" analysis even applies under the former provision, the Court would first need to determine that this case falls within the "individualized exemptions" exception to the general rule of *Smith*. See 494 U.S. at 884. Thus, this issue is a "predicate to intelligent resolution" of the substantial burden issue. *Vance* v. *Terrazas*, 444 U.S. 252, 258-59 n.5 (1980). Accordingly, the Court can and should take this opportunity to resolve this vexing question of federal law as well. See generally Br. of the Becket Fund for Religious Liberty *et al.*

CONCLUSION

For the foregoing reasons and those stated in the petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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May 18, 2004

APPENDIX

APPENDIX

RECORD EXCERPTS

In the U.S. District Court
For the Northern District of Illinois

C.L.U.B. (CIVIL LIBERTIES FOR URBAN BELIEVERS), CHRIST CENTER, CHRISTIAN COVENANT OUTREACH CHURCH, HIS WORD MINISTRIES TO ALL NATIONS, CHRISTIAN BIBLE CENTER, CHURCH ON THE WAY PRAISE CENTER, MONTE DE SION (MOUNT ZION) CHURCH, AND LIVING WORD MINISTRIES,

PLAINTIFFS,

v.

CITY OF CHICAGO AND STATE OF ILLINOIS, PATRICK HUELS, WILLIAM BANKS, AND OTHER ALDERMAN,

DEFENDANTS.

NO. 94 C 6151
JUDGE ANDERSEN
MAGISTRATE JUDGE GUZMAN

AFFIDAVIT OF EXPERT WITNESS
ROBERT CARL LARSON

1. I am over 21 years of age and competent to make this statement.

2. I received my Ph.D. in urban planning from the University of Washington in 1970. My dissertation title was *Institutional Location—A Market Theory and Automated Geocoded Methods with Particular Reference to Churches.*

3. I have over 30 years of experience in church issues as they relate to zoning and urban planning. I was Director of Urban Church Planning for the Evangelical Covenant Church, Chicago, Illinois from 1969-78, and Executive Secretary of the Department of Church Growth and Evangelism from 1979-1990. I have also held various pastoral positions from 1958-1993 and served as an adjunct professor at North Park Theological Seminary in Chicago from 1969-1990. I have been a consultant on real estate issues for churches since 1960. I am a full member of the American Planning Association and its American Institute of Certified Planners. A summary of my qualifications is attached hereto as Exhibit A.

4. In my experience, the modern Christian Church needs to be visible, accessible, and large enough to host a variety of activities. Visibility is required to attract new members and persons cannot receive the services of the church unless the church is also accessible. Facilities that are required include a large open space for large assemblies for worship and prayer, classrooms and nursery services for the education and training of adults and youth requiring smaller meeting rooms, and office space for the pastors and staff. Churches are like businesses which require visibility and accessibility to attract and service its clientele, adequate space to serve their customer base, and offices for administration.

5. In order to meet the requirements of visibility, accessibility, and size, church facilities are properly located on main thoroughfares with space for a large building and plenty of parking. In mature cities, such as Chicago, such parcels of land are typically located in a given city's commercial, manufacturing, and business zones and less likely to be available in residential zones. Commercial, manufacturing, and business zones are also better suited for church use because the needs of any given congrega-

tion will require a wide variety of building shapes and sizes.

6. As a result of my decades of experience with church planning centralized in the City of Chicago, I am keenly aware of the impact of the Chicago Zoning Ordinance on churches. The only zones where churches are a permitted use are in residential zones. However, the residential zones do not provide churches with the visibility, accessibility, and space that they need to function. Also, the increased traffic and parking concerns can negatively impact neighboring residential uses. In contrast, Chicago's business, commercial, and manufacturing zones provide ample visibility and accessibility. Existing buildings in business, commercial, and manufacturing zones, especially those designed for assembly, such as theaters, community centers, assembly halls, lodges, and clubs, are often ideally configured for church use while existing non-church facilities in residential zones are often too small or require extensive renovation prior to church use. Also, if a church located in a residential zone fails, the building has few if any uses, except for another church. In contrast, buildings in commercial zones can be reused by different businesses and churches. Further, church parking concerns are less of an issue in business, commercial, and manufacturing zones since churches' main hours of operation are on evenings and weekends, while businesses operate primarily 9 a.m. to 5 p.m. on weekdays.

7. It is my opinion that the Chicago Zoning Ordinance places a heavy burden on churches seeking to expand or locate a facility in the City of Chicago, which could be remedied by permitting churches to freely locate in certain business, commercial, and manufacturing zones and may be a burden on adjacent residential uses if the church fails.

8. The special use permit requirement under zoning ordinances in general and the Chicago ordinance in particular creates significant difficulties for churches in that:

   A. a church is at a competitive disadvantage relative to others who would seek to acquire the same properties but have no need to acquire a special use permit;

   B. sellers of land or buildings which a church is seeking to acquire and which require a special use permit prefer to sell to other parties, who do not need a special use because of the greater certainty the sale will be consummated and the possibility that the sale will close sooner;

   C. the expense of the special procedure such as filing fees, appraiser costs title charges, certified mail expenses, and attorneys fees;

   D. the political involvement of aldermen and neighbors allows factors such as religious, racial, ethnic, or socioeconomic biases to effect the outcome in some circumstances; and

   E. in the event the church feels it is improperly denied a special use permit, judicial protection is often unavailable as a practical matter because in many if not most cases:

      i. the seller will not agree to keep the property off the market the many months or several years necessary for litigation;

      ii. mortgage financing is not available because the lender does not feel secure without a definite legal right of the borrower to use the property; and

      iii. the expense of owning the property while not being able to use it or rehabilitate it for church use can be enormous.

9. I have studied and experienced the effects of churches upon surrounding properties in business, commercial, and manufacturing zones. Based upon these studies and that experience I am of the opinion that churches do not adversely affect the usability, value, or other attributes of beneficial enjoyment of such surrounding properties differently than recreation centers, meeting halls, funeral parlors, community centers, arenas, stadiums, or auditoriums because the essential function of such uses is as a place of assembly and the external effect of a place of assembly depends upon size of the assembly and intensity of the use rather than the content of the assembly.

FURTHER AFFIANT SAYETH NAUGHT.

DATED this 22 day of July, 1998.

Respectfully submitted,

/s/ Robert C. Larson
ROBERT CARL LARSON

SIGNED and SWORN to before me
this 22 day of July, 1998.

/s/ John W. Mauck [official notary seal]
NOTARY PUBLIC

In the U.S. District Court
For the Northern District of Illinois

C.L.U.B. (CIVIL LIBERTIES FOR URBAN BELIEVERS), CHRIST CENTER, CHRISTIAN COVENANT OUTREACH CHURCH, HIS WORD MINISTRIES TO ALL NATIONS, CHRISTIAN BIBLE CENTER, CHURCH ON THE WAY PRAISE CENTER, MONTE DE SION (MOUNT ZION) CHURCH, AND LIVING WORD MINISTRIES,

PLAINTIFFS,

v.

CITY OF CHICAGO AND STATE OF ILLINOIS, PATRICK HUELS, WILLIAM BANKS, AND OTHER ALDERMAN,

DEFENDANTS.

NO. 94 C 6151
JUDGE ANDERSEN
MAGISTRATE JUDGE GUZMAN

AFFIDAVIT OF EXPERT WITNESS MARIA ARBEEN

MARIA ARBEEN, being first duly sworn, deposes and testifies as follows:

* * * *

7. The only place where churches may freely locate without a permit in the City of Chicago are in residential districts. However, if a church wishes to build in a residential district, it is almost, if not completely, impossible to find a parcel of vacant land large enough to build a church in a residential zone. A recent computer search which I conducted revealed that there were 13 parcels of vacant land available for purchase which had a sufficient land area for a small con-

gregation of 70 to build a church. (Ex. B) However, not all of these lots were deep enough or located in the general area that a church would necessarily find desirable. In my experience, existing buildings suitable for conversion to church use by the small congregation described above in residential zones are likewise scarce. In contrast, there were 37 such vacant parcels in business, commercial and manufacturing zones. However, I believe there are many more business, commercial, and manufacturing properties available since most brokers specializing in such properties do not use the Multiple Listing Service.

8. At a minimum, I would estimate that a medium sized congregation of 500 persons requires approximately 8 city lots in which to build a facility and parking lot which satisfies the City of Chicago Building Code requirements. Three lots are needed for the facility and five extra lots for the 42 required parking spaces. (Forty-two spaces are required at 300 square feet a space.)

9. Vacant land available to accommodate the church building needs of a medium sized congregation of 500 is even more scarce. A recent computer search which I conducted revealed that there were 3 parcels of vacant land available for purchase in residential zones on which a medium sized congregation of 500 could build a church under the City of Chicago zoning requirements. In contrast, there were 15 such vacant parcels in business, commercial, and manufacturing zones. However, I believe there are many more business, commercial, and manufacturing properties available since most brokers specializing in such properties do not use the Multiple Listing Service.

10. In addition, most congregations require additional parking and a centralized location because a significant number of those in the congregation drive or take public transportation to church. This pattern of congregants driving to church increases the need for parking. If a congregation of 500 wishes to provide adequate parking of one space for

every three seats, then three lots will be required for the facility and seventeen lots will be required for parking (one hundred sixty-seven spaces are required at 300 square feet per space.) Zero parcels of land were found in residential zones of this size. In contrast, there were 3 such vacant parcels in business, commercial, and manufacturing zones. However, I believe there are many more businesses, commercial, and manufacturing properties available since most brokers specializing in such properties do not use the Multiple Listing Service.

11. Available existing church buildings in good condition are extremely scarce. In my experience, when a church building goes on the market in Chicago, it receives approximately 30-40 inquiries in the first 2 months and is sold in the first month. A decent church will be sold in about 10 days, and if a decent church is priced appropriately it can be sold in one day. However, most of the churches on the market are in poor condition, lack adequate parking, or contain insufficient space for congregational needs. In recent months, I have been in contact with approximately 75-100 churches in Chicago alone that have been searching for an adequate permanent facility but have been unable to secure a facility due to the lack of buildings available for church use.

12. In my opinion, the City of Chicago Zoning Ordinance places an extremely heavy burden on congregations attempting to locate church buildings. This burden increases dramatically as the size of the congregation increases. Despite the fact that the land the Zoning Ordinance makes freely available to churches is completely inadequate, churches are either categorically or discretionarily excluded from ample and adequate land in the remainder of the City of Chicago.

* * * *

FURTHER AFFIANT SAYETH NAUGHT.

DATED this 22nd day of July, 1998

/s/ Maria Arbeen
Maria Arbeen

SIGNED AND SWORN to before
me this 22nd day July, 1998

/s/ Carol A. Riley
NOTARY PUBLIC
[official notary seal]

In the United States District Court
For the Northern District of Illinois

C.L.U.B. (CIVIL LIBERTIES FOR URBAN BELIEVERS), CHRIST CENTER, CHRISTIAN COVENANT OUTREACH CHURCH, HIS WORD MINISTRIES TO ALL NATIONS, CHRISTIAN BIBLE CENTER, CHURCH ON THE "WAY" PRAISE CENTER, MONTE DE SION (MOUNT ZION) CHURCH, AND LIVING WORD MINISTRIES,

PLAINTIFFS,

V.

CITY OF CHICAGO AND STATE OF ILLINOIS, PATRICK HUELS, WILLIAM BANKS, AND OTHER ALDERMEN,

DEFENDANT.

NO. CASE NO. 94 C 6151
JUDGE HIBBLER

PLAINTIFFS' STATEMENT OF UNCONTESTED MATERIAL FACTS REGARDING ALL SUMMARY JUDGMENT MOTIONS EXCEPT COUNT XII (HIS WORD REZONING)

All Plaintiffs by their attorneys Mauck, Bellande & Cheely, pursuant to Local Rule 56.1(a)(3) set forth material facts as to

which no genuine issues exist. These facts apply to all of the summary judgment motions filed by plaintiffs.

* * * *

Religious Practices Relating to Land Use

27. All members of C.L.U.B. and all individual church plaintiffs have the following activities which are an integral part of their beliefs and religious exercises:

    A. weekly assembly of the congregation to worship (Scrip. ref. Hebrews 10:25);

    B. weekly preaching - including speech relating to personal morality, God, social and political issues (Scrip. ref. 2 Timothy 4:2);

    C. pastoral counseling for the disturbed, lonely and brokenhearted;

    D. prayer meetings (Scrip. ref. Acts 1:13-14);

    E. singing and musical performances (Psalm 82:1-2);

    F. baptisms and/or confirmations, weddings, funerals and communion (Scrip. ref. Matthew 28:19-20; Luke 22:19);

    G. Bible studies; (Scrip. ref. 2Timothy 2:15)

    H. nurseries or crib rooms for infants and toddlers;

    I. youth activities, including games and sports;

    J. social gatherings such as church dinners;

    K. service projects for members of the congregation, the poor and the general community, such as gatherings for Alcoholics Anonymous, Girl Scouts, singles groups or seniors groups (Scrip. ref. James 1:27);

L. expression of their faith through the architecture of the house of worship, signs, crosses, paintings, windows, banners or decorations;

M. Evangelism - sharing the Christian message and persuading others to believe in Jesus, particularly those who visit their church meetings;

N. financial giving to support salaries, building costs, help for the poor, and ministries for the congregation;

O. administration (bookkeeping, financial, building upkeep, etc.) (Scrip. ref. Romans 12:6).

Third Amended Complaint ¶ 26, depositions of Pastors Wilkinson, Kantor, Llorena, Crossley, Acevedo, Garner, Lowery, passim and affidavits Ex. A1 to A8

28. The ability to conduct, the cost of conducting and the quality of each religious exercise listed in the preceding paragraph is significantly impacted by the type and location of building or facility each plaintiff congregation and member of C.L.U.B. located in Chicago has available, or may need to acquire, in the following ways:

A. number of people who can be accommodated;

B. availability of parking;

C. proximity to public transportation;

D. cost of building acquisition or rental;

E. cost of building repair and maintenance;

F. number, size and design of rooms such as nurseries, gymnasiums, pastoral offices, washrooms, kitchens and business offices;

G. safety for members and visitors and protection of church property;

H. appearance and aesthetics;

I. noise levels;

J. scope of and type of community service projects.

Third Amended Complaint ¶ 26, depositions of Pastors Wilkinson, Kantor, Llarena, Crossley, Acevedo, Garner, Lowery, passim and affidavits Ex. A1 to A8

* * * *

Respectfully,

/s/ John W. Mauck
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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CIVIL LIBERTIES FOR URBAN BELIEVERS, ET AL.,

v.

CITY OF CHICAGO AND STATE OF ILLINOIS.

AFFIDAVIT OF MOUNT ZION CHURCH
(IGLESIA DE AVIVAMIENTO MONTE DE SION)

I, Jose Acevedo, being sworn upon my oath, state that I am the Pastor of Iglesia de Avivamiento Monte de Sion and that I have personal knowledge of the facts stated herein and am competent to testify thereto:

* * * *

11. When we lost the property on Pulaski, the congregation became discouraged because it seemed unlikely that we would be able to find a bigger meeting place. Some members of the church became so upset with our situation that they left the church.

* * * *

/s/ Jose Acevedo
Pastor Jose Acevedo

Subscribed and sworn to before me this 22 day of September, 1994.

/s/ Karen Hogenboom
Notary Public
[official notary seal]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CIVIL LIBERTIES FOR URBAN BELIEVERS, ET AL.,

v.

CITY OF CHICAGO AND STATE OF ILLINOIS.

AFFIDAVIT OF
CIVIL LIBERTIES FOR URBAN BELIEVERS

I, Theodore Wilkinson, being sworn upon my oath, state that I am the Chairman of the Board of Directors of Civil Liberties for Urban Believers ("CLUB") and that I have personal knowledge of the facts stated herein and am competent to testify thereto:

* * * *

2. The member churches of CLUB are churches which have been damaged or suffered under the zoning ordinances of the City of Chicago in one or more of the following ways:

* * * *

h. They have lost membership and contributions due to their inability to find suitable property for which they could obtain a special use permit.

* * * *

Dated: September 13, 1994

/s/ Pastor Theodore V. Wilkinson

Signed and sworn to before me this 13th day of September, 1994.

/s/ Karen Hogenboom
Notary Public
[official notary seal]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CIVIL LIBERTIES FOR URBAN BELIEVERS, ET AL.,

v.

CITY OF CHICAGO AND STATE OF ILLINOIS.

AFFIDAVIT OF CHRISTIAN BIBLE CENTER

I, Jerone E. Lowrey, being sworn upon my oath, state that I am the Pastor of Christian Bible Center and that I have personal knowledge of the facts stated herein and am competent to testify thereto:

* * * *

22. The emotional cost to the congregation has been extremely high. At one point during the process, in the summer of 1991, the Board seriously discussed dissolving the church, due to the untenable situation we were in and the opposition we faced. We have lost members, whose absence has been keenly felt in the programs of the church and in its budget. The current size of the congregation is approximately fifty adults, plus children.

/s/ Jerone E. Lowrey
Jerone E. Lowrey

Signed and sworn to before me this 14 day of September, 1994.

/s/ Karen Hogenboom
Notary Public
[official notary seal]

MOTION FILED
MAY 7 - 2004

(2)

No. 03-1397

IN THE
Supreme Court of the United States

CHRIST CENTER, *ET AL. Petitioners,*
v.
CITY OF CHICAGO, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* THE BECKET FUND FOR RELIGIOUS LIBERTY AND VARIOUS RELIGIOUS ORGANIZATIONS IN SUPPORT OF PETITIONERS

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No. 03-1397

IN THE

Supreme Court of the United States

CHRIST CENTER, *ET AL. Petitioners,*

v.

CITY OF CHICAGO, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION OF THE BECKET FUND FOR RELIGIOUS LIBERTY AND VARIOUS RELIGIOUS ORGANIZATIONS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Amici curiae The Becket Fund for Religious Liberty, the Muslim Community Center, the New Heritage Cathedral, the Great Lakes Society, Haven Shores Community Church, Pine Hill Zendo, Christ Church New Jersey, Adat Hatikvah, and Christian Assembly of Suburban Chicago respectfully request leave of this Court to file the following brief in the above-captioned matter. In support of this motion, *amici curiae* state as follows:

Petitioners have granted their consent to the filing of this brief. A consent letter from Petitioner is on file with the Court. However, respondent the City of Chicago informed *amici* on May 6 that it would deny consent to the filing of the

following brief, thus necessitating the Court's consideration of this motion.[1]

The Becket Fund for Religious Liberty is an interfaith, bi-partisan, public interest law firm dedicated to protecting the free expression of all religious traditions and the freedom of religious people and institutions to participate fully in public life. The Becket Fund litigates in support of these principles in state and federal courts throughout the United States, both as primary counsel and as *amicus curiae*. Further information regarding the Becket Fund's interest and ability to aid the Court as an *amicus curiae* is set forth in the following brief.

The Muslim Community Center (the "Center") was founded in 1969 to serve the needs of Muslims in Chicago Metropolitan Area. The Center's primary purpose is to provide a place for Muslims to worship together and pray. The Center is currently involved in contentious litigation regarding its plans to construct a mosque in the Village of Morton Grove, Illinois – plans that are essential to its religious mission.

The New Heritage Cathedral (the "Cathedral"), founded in 1986, is a 600-member church affiliated with the Assemblies of God. The Cathedral is located in Chicago,

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[1] The Solicitor General is listed on the Court's docket as "Attorney for Respondents." However, because the constitutionality of a federal statute is not at issue before this Court, as it was before the Court of Appeals for the Seventh Circuit, the United States has not yet determined whether it will be a respondent in this matter. It is the understanding of counsel for the *amici*, based on conversations with the Solicitor General's office, that the United States will either act as a respondent in this matter and then consent to the filing of briefs *amici curiae*, or the United States will not act as a respondent and will seek to withdraw its name from the Court's docket. However, the United States does not wish to consent to the filing of briefs *amici curiae* unless it decides to become a respondent.

Illinois, but it draws its congregation from several areas in and around Chicago, including the predominantly African-American Englewood neighborhood. The Cathedral is currently located in a former Catholic church. The Cathedral is keenly interested in Chicago's zoning ordinance, particularly its discriminatory effects on religious land uses within the city, because the Cathedral may need to expand or relocate in the future.

Great Lakes Society ("GLS") is a religious society organized under and pursuant to the laws of the State of Michigan as an ecclesiastical non-profit corporation, principally located in Georgetown Township, Ottawa County, Michigan. GLS is a religious group that ministers to people with chemical sensitivities and the disabled. GLS recently filed suit against Georgetown Township, charging violations of its own zoning law as well as the U.S. and Michigan Constitutions and the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). The lawsuit, filed in Ottawa County Circuit Court, appeals the Township's denial of the Society's application for a special use permit so that it could build a new church on its property.

Haven Shores Community Church is an organized congregation of the Holland Classis of the Reformed Church in America. This denomination has been faithfully serving in this country since the early 1500's. In the first case resolved under provisions of RLUIPA, this small church in western Michigan won the right to occupy a storefront property located in a business district where "places of assembly"—but not churches—were already permitted.

Pine Hill Zendo ("Zendo") is an authentic Rinzai Zen Buddhist temple situated right outside the hamlet of Katonah in northern Westchester, New York. It is closely associated with The Zen Studies Society and can be considered a sub temple of International Dai Bosatsu Zendo Kongo Ji

monastery in the Catskills. In 2001, the local zoning board denied Zendo's application for a special use permit, and Zendo subsequently filed suit pursuant to First Amendment jurisprudence and RLUIPA. Settlement was reached in 2002 and the special permit was issued.

Christ Church New Jersey (the "Church"), a nonprofit, New Jersey corporation, is a multi-racial, nondenominational Christian church founded in 1986. It has more than 5,000 active members residing in northern New Jersey and the New York metropolitan areas. The Church is currently seeking a conditional use permit to build a new campus on a large site in Rockaway Township, New Jersey, and it has faced considerable local opposition to the project. Although the Church's site is zoned to allow churches as conditional uses, the local Planning Board has delayed approval of the permit while it considers whether Christ Church is a "church" within the meaning of the conditional use ordinance. The Church has relied on the provisions of RLUIPA in its presentations to the Planning Board, and it is keenly interested in the proper enforcement of the statute.

Adat Hatikvah (the "Congregation") is a Messianic Jewish Congregation belonging to the Union of Messianic Jewish Congregations, with weekly attendance of 75 to 100. The Congregation believes a person can affirm Messiah Yeshua while maintaining his or her Jewish identity. It is located in a northern Chicago suburb with a large Jewish community, where, with considerable inconvenience, it currently shares space with two other churches by renting. It is actively seeking but has been unable to find a suitable property to purchase for its own use. The Congregation is concerned that when it finds a physically suitable building, it will be unable to obtain zoning permission due to the discretionary nature of zoning approvals and the reality that many people do not like Jewish believers in Jesus.

Christian Assembly of Suburban Chicago, founded in 1984, is a congregation of predominantly Chinese-Americans with average attendance of 200. It has been renting space in churches, seminaries, and hotels for the past 20 years because zoning laws have been a barrier to finding a suitable property for a new church in the western suburbs of Chicago, where its members reside. It is currently seeking to convert a building in an industrial district where churches are not a permitted use but other assembly uses and community centers are permitted.

The unique perspectives and arguments set forth in the brief following demonstrate that each of the *amici* will be able to "bring[ ] to the attention of the Court relevant matter not already brought to its attention by the parties" that will be "of considerable help to the Court." Rule 37.1.

For the foregoing reasons, the motion for leave to file the attached brief of *amici curiae* should be granted.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI* 1

SUMMARY OF THE ARGUMENT 4

REASONS FOR GRANTING THE WRIT 5

I. In Addition to the Questions Presented by Petitioners, This Court's Review Is Needed to Resolve Confusion Among the Lower Courts Regarding the Meaning and Consequence of the Term "Individualized Assessments." 5

II. The Confusion over the Questions Presented by Petitioners, as Well as the Meaning and Consequence of "Individualized Assessments," Is Not an Abstract Problem, but Instead Bears Severe Consequences for Religious Communities Nationwide, and Especially for Religious Minorities in the Land-Use Permitting Context. 13

A. Congress Recently Heard "Massive Evidence" That Discretionary Zoning Processes Routinely Enforce the Covert Religious Biases of Local Government Officials and Private Citizens. 13

B. The Experience of *Amici* Under RLUIPA Has Confirmed the Evidence Presented to Congress. 16

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

American Friends Serv. Comm. Corp. v. *Thornburgh*,
951 F.2d 957 (9th Cir. 1991) 10
Archdiocese of Denver v. *Town of Foxfield*,
Case No. 01-CV-3299 (Colo. D.Ct.) 2
Axson-Flynn v. *Johnson*,
356 F.3d 1277 (10th Cir. 2004) 11
Calvary Chapel O'Hare v. *Village of Franklin Park*,
Civ. No. 02-3338 (N.D. Ill.) 2
Catholic Charities of Sacramento, Inc. v. *Superior Court*,
109 Cal. Rptr. 2d 176 (Cal. 2004) 12
Church of the Lukumi Babalu Aye, Inc. v. *City of Hialeah*,
508 U.S. 520 (1993) 7
Cottonwood Christian Center v. *City of Cypress*,
218 F. Supp. 2d 1203 (C.D. Cal. 2002) 2
Employment Division v. *Smith*,
494 U.S. 872 (1990) 4, 6
Fifth Avenue Presbyterian Church v. *City of New York*,
293 F.3d 570 (2d Cir. 2002) 3
First Covenant Church of Seattle v. *City of Seattle*,
840 P.2d 174 (Wash. 1992) 10
Fraternal Order of Police v. *City of Newark*,
170 F.3d 359 (3d Cir. 1999) 12
Freedom Baptist Church v. *Township of Middletown*,
204 F. Supp. 2d 857 (E.D. Pa. 2002) 2
Goodall by Goodall v. *Stafford County Sch. Bd.*,
60 F.3d 168 (4th Cir. 1995) 13
Greenwood Comm'y Church v. *City of Greenwood Village*,
Civ. No. 02-1426 (Colo. D.Ct.) 3
Hale O Kaula v. *Maui Planning Comm'n*,
229 F. Supp. 2d 1050 (D. Haw. 2002) 2
Haven Shores Comm'y Church v. *City of Grand Haven*,
1:00-CV-175 (W.D. Mich.) 3

Intercommunity Ctr. for Justice & Peace v. *INS*,
910 F.2d 42 (2d Cir. 1990) 11
Johnson v. *Martin*,
223 F. Supp. 2d 820 (W.D. Mich. 2002) 3
Korean Buddhist Dae Won Sa Temple of Hawaii v. *Sullivan*,
953 P.2d 1315 (Haw. 1998) 11
Living Waters Bible Church v. *Town of Enfield*,
Civ. No. 01-450 (D.N.H.) 3
Midrash Sephardi v. *Town of Surfside*,
No. 03-13858, ___ F.3d ___, 2004 WL 842527
(11th Cir. Apr. 21, 2004) 9
Missionaries of Charity, Brothers v. *City of Los Angeles*,
Civ. No. 01-08511 (C.D. Ca. filed Sept. 19, 2001) 2
Pine Hills Zendo v. *Town of Bedford, N.Y. Zoning Bd. of Appeals*,
No. 17833-01 (N.Y. Sup. Ct., Apr. 8, 2002) 3
Redwood Christian Schs. v. *County of Alameda*,
Civ. No. 01-4282 (N.D. Ca. filed Nov. 16, 2001) 2
Refuge Temple Ministries v. *City of Forest Park*,
Civ. No. 01-0958 (N.D. Ga.) 3
San Jose Christian College v. *City of Morgan Hill*,
360 F.3d 1024 (9th Cir. 2004) 3, 9, 10
St. John's United Church of Christ v. *City of Chicago*,
No. 03-C-3726 (N.D. Ill. filed May 30, 2003) 2
Swanson v. *Guthrie Indep. Sch. Dist. No. I-L*,
135 F.3d 694 (10th Cir. 1998) 11
Temple B'nai Sholom v. *City of Huntsville*,
Civ. No. 01-1412 (N.D. Ala.) 3
Tenafly Eruv Ass'n v. *Borough of Tenafly*,
309 F.3d 144 (3d Cir. 2002) 12, 13
Unitarian Universalist Church of Akron v. *City of Fairlawn*,
Civ. No. 00-3021 (N.D. Ohio) 3
United States v. *Maui*,
298 F. Supp. 2d 1010 (D. Haw. 2004) 2
Vandiver v. *Hardin County Bd. of Educ.*,
925 F.2d 927 (6th Cir. 1991) 11, 12

Williams v. *Bitner*,
285 F. Supp. 2d 593 (M.D. Pa. 2003) 3

Statutes

Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, *et seq.* 2, 5, 9

Other Authorities

146 CONG. REC. S7774-75 (daily ed. July 27, 2000) (Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000) 16
Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 769-83 (1999) 15
Storzer & Picarello, *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929 (Summer 2001) 3

No. 03-1397

IN THE

Supreme Court of the United States

CHRIST CENTER, *ET AL. Petitioners,*

v.

CITY OF CHICAGO, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE* THE BECKET FUND FOR RELIGIOUS LIBERTY AND VARIOUS RELIGIOUS ORGANIZATIONS IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI*

The Becket Fund for Religious Liberty respectfully submits this brief on behalf of itself, the Muslim Community Center, the New Heritage Cathedral, the Great Lakes Society, Haven Shores Community Church, Pine Hill Zendo, Christ Church New Jersey, Adat Hatikvah, and Christian Assembly of Suburban Chicago, as *amici curiae* in support of Petitioner pursuant to Rule 37.2 of this Court.[1]

[1] No counsel for any party authored this brief in whole or in part. No person or entity other than *amici* and their members made any monetary contributions to the preparation or submission of this brief.

The Becket Fund for Religious Liberty is an interfaith, bi-partisan, public interest law firm dedicated to protecting the free expression of all religious traditions and the freedom of religious people and institutions to participate fully in public life. The Becket Fund litigates in support of these principles in state and federal courts throughout the United States, both as primary counsel and as *amicus curiae*.

Accordingly, the Becket Fund has been heavily involved in litigation on behalf of a wide variety of religious worshippers, ministers, and institutions under the new Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, *et seq.* ("RLUIPA" or "the Act"). The Becket Fund's RLUIPA cases run the gamut – as *amicus curiae* and as plaintiffs' counsel, in prisoner and land-use cases, from New Hampshire to Hawaii – including cases arising in the Chicago area.[2] The Becket Fund is also litigating a host of RLUIPA land-use cases as plaintiffs' counsel outside Chicago, including some that have resulted in published decisions.[3] Some of our RLUIPA land-use

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[2] *See, e.g., C.L.U.B.* v. *City of Chicago*, 342 F.3d 752 (7th Cir. 2003) (*amicus* brief filed June 26, 2002); *St. John's United Church of Christ* v. *City of Chicago*, No. 03-C-3726 (N.D. Ill. filed May 30, 2003); *Calvary Chapel O'Hare* v. *Village of Franklin Park*, Civ. No. 02-3338 (N.D. Ill.) (settlement agreement signed Sept. 3, 2002).

[3] *See, e.g., Castle Hills First Baptist Church* v. *City of Castle Hills*, Civ. No. 01-1149 __ F. Supp. 2d __, 2004 WL 546792 (W.D. Tex. Mar. 17, 2004); *United States* v. *Maui*, 298 F. Supp. 2d 1010 (D. Haw. 2004); *Hale O Kaula* v. *Maui Planning Comm'n*, 229 F. Supp. 2d 1050 (D. Haw. 2002); *Cottonwood Christian Center* v. *City of Cypress*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002); *Freedom Baptist Church* v. *Township of Middletown*, 204 F. Supp. 2d 857 (E.D. Pa. 2002). *See also Redwood Christian Schs.* v. *County of Alameda*, Civ. No. 01-4282 (N.D. Ca. filed Nov. 16, 2001); *Missionaries of Charity, Brothers* v. *City of Los Angeles*, Civ. No. 01-08511 (C.D. Ca. filed Sept. 19, 2001); *Archdiocese of Denver* v. *Town of Foxfield*, Case No. 01-CV-3299 (Colo. D.Ct.).

cases have concluded by favorable settlement.[4] In addition, we have filed a series of *amicus* briefs in both land-use and prisoner cases involving RLUIPA.[5] We intend to continue filing lawsuits and *amicus curiae* briefs under RLUIPA until the jurisprudence under the law, as well as its constitutionality, is established beyond reasonable dispute.

Finally, two authors of this brief have published a law review article that contains a guide for applying the Act and a defense of its constitutionality against the challenges most frequently raised. *See* Storzer & Picarello, *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices,* 9 GEO. MASON L. REV. 929 (Summer 2001).

The Becket Fund believes that its experience in this area of the law will enable it to aid the Court in

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[4] *See, e.g., Temple B'nai Sholom* v. *City of Huntsville*, Civ. No. 01-1412 (N.D. Ala.) (settlement approved June 26, 2003); *Greenwood Comm'y Church* v. *City of Greenwood Village*, Civ. No. 02-1426 (Colo. D.Ct.) (permit granted Dec. 2, 2002); *Living Waters Bible Church* v. *Town of Enfield*, Civ. No. 01-450 (D.N.H.) (agreement for entry of judgment signed Nov. 18, 2002); *Pine Hills Zendo* v. *Town of Bedford, N.Y. Zoning Bd. of Appeals*, No. 17833-01 (N.Y. Sup. Ct.) (settlement agreement allowing religious use and paying plaintiffs' costs, Apr. 8, 2002); *Refuge Temple Ministries* v. *City of Forest Park*, Civ. No. 01-0958 (N.D. Ga.) (consent order signed Mar. 14, 2002); *Unitarian Universalist Church of Akron* v. *City of Fairlawn*, Civ. No. 00-3021 (N.D. Ohio) (settlement approved Oct. 1, 2001); *Haven Shores Comm'y Church* v. *City of Grand Haven*, 1:00-CV-175 (W.D. Mich.) (consent decree signed Dec. 20, 2000).

[5] *See, e.g., Williams* v. *Bitner*, 285 F. Supp. 2d 593, 598 (M.D. Pa. 2003) (noting Becket Fund intervention in defense of constitutionality of RLUIPA); *Johnson* v. *Martin*, 223 F. Supp. 2d 820, 822 (W.D. Mich. 2002) (same); *San Jose Christian College* v. *City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004) (*amicus* brief filed Aug. 28, 2002); *Fifth Avenue Presbyterian Church* v. *City of New York*, 293 F.3d 570 (2d Cir. 2002) (*amicus* brief filed Mar. 15, 2002).

understanding the extent of division among lower courts – and the human cost of that division – for purposes of deciding whether to grant the writ in this case.

The interests of *amici* the Muslim Community Center, the New Heritage Cathedral, the Great Lakes Society, Haven Shores Community Church, Pine Hill Zendo, Christ Church New Jersey, Adat Hatikvah, and Christian Assembly of Suburban Chicago are set forth in the accompanying motion for leave to file a brief as *amici curiae*.

SUMMARY OF THE ARGUMENT

The term "individualized assessments" in this Court's Free Exercise jurisprudence has confused and divided lower courts since its first appearance in a majority opinion in *Employment Division* v. *Smith*, 494 U.S. 872 (1990). Religious groups – especially religious minorities – have paid a heavy price for that confusion – especially in land-use permitting decisions.

The confusion surrounds the following questions. First, in general, what is a "system of individualized assessments," and in particular, does it include discretionary systems for deciding whether to grant zoning permits to religiously motivated land uses?

Second, what is the legal consequence of finding that a "system of individualized assessments" is operative in a particular case? Does such a system trigger strict scrutiny because it is a certain type of discriminatory law (*i.e.*, one that is not "neutral" or not "generally applicable")? Or would such a system trigger strict scrutiny when it is applied to impose a "substantial burden" on religious exercise, even without a showing of discrimination?

These questions are not only sharply divisive but exceptionally important. The confusion surrounding them has left religious communities especially vulnerable to the type of discrimination that may be concealed easily within discretionary decision-making processes.

Nine congressional hearings over three years have revealed that this type of discrimination occurs frequently and nationwide in the context of zoning permit decisions; is directed against small, unfamiliar, or otherwise locally unpopular religious groups even more frequently; and is especially difficult to prove in court. As a result, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), including Section 2(a)(1) and Section 2(a)(2)(C), which together apply strict scrutiny to land-use regulations that impose "substantial burdens" on religious exercise pursuant to systems of "individualized assessments." *See* 42 U.S.C. § 2000cc-a.

The experience of *amici* since the passage of RLUIPA confirms that the phenomenon Congress identified is widespread and persistent. Accordingly, the questions surrounding the meaning and consequence of "individualized assessments" represent issues of exceptional importance. In other words, *amici's* experience confirms that, unless the courts uniformly recognize discretionary land-use permitting processes as "systems of individualized assessments" – and unless "substantial burdens" imposed through such systems trigger strict scrutiny without having to prove discrimination (which is extremely difficult in that context) – this especially insidious form of discrimination will continue unchecked.

In sum, the exceptional confusion regarding the term "individualized assessments" in Free Exercise jurisprudence – and the exceptionally important, real-world effects of this confusion – together represent yet another strong reason to grant the writ in this case.

REASONS FOR GRANTING THE WRIT

I. IN ADDITION TO THE QUESTIONS PRESENTED BY PETITIONERS, THIS COURT'S REVIEW IS NEEDED TO RESOLVE CONFUSION AMONG THE LOWER COURTS REGARDING THE MEANING AND CONSEQUENCE OF THE TERM "INDIVIDUALIZED ASSESSMENTS."

Petitioners have raised, but not at length, the conflict among Courts of Appeals and state Supreme Courts regarding the term "individualized assessments" within this Court's Free Exercise Clause jurisprudence. Pet. 23 n.8. Because this term has created several fault lines among the lower courts, it represents an additional and important reason for granting the writ in this case.

In *Employment Division* v. *Smith,* 494 U.S 872 (1990), this Court announced the general rule that laws burdening religious exercise trigger strict scrutiny only when they are not "neutral" or not "generally applicable." Notably, however, this Court did *not* overrule its prior decisions that applied strict scrutiny to even incidental burdens on religious exercise, so long as the burdens were "substantial."

Instead, *Smith* distinguished those cases in two ways. Where substantial burdens had triggered strict scrutiny in the unemployment compensation context, the Court distinguished the cases as involving "systems of individualized governmental assessment of the reasons for the relevant conduct." *Id.* at 884. For all other applications of strict scrutiny to substantial burdens, the Court distinguished those cases as involving "hybrid situation[s]" involving "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the right of parents ... to direct the education of their children." *Id.* at 881-82 (citations omitted).

Three years later, in *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah,* 508 U.S. 520 (1993), the Court applied *Smith's* "individualized assessments" language outside the unemployment compensation context, and in the course of assessing whether the local ordinances at hand were "neutral":

> [B]ecause it requires an evaluation of the particular justification for the killing, this ordinance represents a system of "individualized governmental assessment of the reasons for the relevant conduct." As we noted in *Smith,* in circumstances in which individualized exemptions from a general requirement are available, the government "may not refuse to extend that system to cases of 'religious hardship' without compelling reason." Respondent's application of the ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons. Thus, religious practice is being singled out for discriminatory treatment.

Id. at 537-38 (citations omitted). The *Lukumi* Court also noted that "[n]eutrality and general applicability are interrelated, and ... failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Id.* at 531.

In light of these decisions, federal Courts of Appeals and state Supreme Courts have been unable to agree on two basic questions. First, what kinds of laws are systems of "individualized assessments"? More specifically, and more relevant to the case at bar, does the term include discretionary zoning processes for determining whether religious exercise will be permitted on a particular property?

Second, what are the legal consequences that flow from finding such a system at work in a particular case? Are "systems of individualized assessments" laws to which the pre-*Smith* "substantial burden" test still applies, because *Smith* did not overrule the substantial burden cases fitting that description? Or are "systems of individualized assessments" a subspecies of discriminatory law – whether not "neutral" or not "generally applicable" – that does not require a showing of substantial burden to trigger strict scrutiny?

The opinion below typifies this confusion. The panel did not offer a more specific definition of "individualized assessments," but did suggest that the City of Chicago's zoning ordinance is such a system. *C.L.U.B.*, 342 F.3d at 764. Even so, the panel found that strict scrutiny did *not* apply in this case, because the City's mechanisms for individualized exemptions – such as Special Use, Map Amendment, or Planned Development approval – *had* been extended to the Plaintiff churches in two respects. First, the churches were able (in fact, required) to apply for the discretionary exemptions offered under the system. Second, the churches that sought the available exemptions were ultimately granted them. The panel concluded that the zoning scheme was therefore "generally applicable." Although the panel did not use the precise term "substantial burden," it noted that a related element in the Free Exercise analysis would be whether the "burdens incidental to [the] churches' seeking" exemptions would "amount to 'religious hardship' within the meaning of ... *Hialeah*." In short, the Seventh Circuit did not explain (or perhaps did not know) whether systems of "individualized assessments" generate discrimination problems, substantial burden problems, or both.

In contrast, the Eleventh Circuit recently held in *Midrash Sephardi* v. *Town of Surfside*, No. 03-13858, ___

F.3d ___, 2004 WL 842527 (11th Cir. Apr. 21, 2004), that "individualized assessments" in zoning permit decisions trigger a substantial burden inquiry, because such systems invoke a high risk of hidden discrimination. Applying RLUIPA Sections 2(a) and 2(a)(2)(C), the court found that the process of applying for a conditional use permit ("CUP") was a system of "individualized assessments," because it "results in a case-by-case evaluation of the proposed activity of religious organizations, [and] carries the concomitant risk of idiosyncratic application of SZO standards." *Id.* at *6. The court added that local "officials may use their authority to individually evaluate and either approve or disapprove of churches and synagogues in potentially discriminatory ways." *Id.* at *6.

Having concluded that this was "quintessentially an 'individual assessment' regime," the court proceeded to the substantial burden inquiry.[6] *Id.* at *6. The court did not discuss the concepts of neutrality and general applicability in connection with "individualized assessments," but instead in connection with principles of discrimination and equal treatment across religious lines. *Id.* at *14. In sum, in accordance with the structure of RLUIPA, but in contrast to the *C.L.U.B.* decision, the *Midrash* court treated the term "system of individualized assessments" solely as a category of substantial burden cases that *Smith* did not overrule.

In *San Jose Christian College* v. *City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004), the Ninth Circuit simply ignored the term "individualized assessments." Because it found no substantial burden under RLUIPA Section 2(a)(1),

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[6] Notably, the *Midrash* court's finding of a system of individualized assessments was based in part on the fact that every church or synagogue was subject to that requirement. *Id.* at *6. In *C.L.U.B.*, by contrast, that same fact was invoked in support of the conclusion that the zoning system was "generally applicable." *C.L.U.B.*, 342 F.3d at 764.

it never reached the question of whether the "individualized assessments" jurisdictional element of Section 2(a)(2)(C) was satisfied. *Id.* at 1035. And in discussing applicable Free Exercise principles, the panel omitted any mention whatsoever of the "individualized assessments" language of *Smith* and *Lukumi*, but did discuss neutrality, general applicability, and hybrid rights. *Id.* at 1030-32.

Notably, the Ninth Circuit has recognized and applied the term "individualized assessments" as one of two "exception[s]" – along with hybrid rights – "to the rule in *Smith*" that only neutral and generally applicable laws trigger strict scrutiny. *See American Friends Serv. Comm. Corp.* v. *Thornburgh*, 951 F.2d 957, 961 (9th Cir. 1991). The *Thornburgh* court rejected plaintiff's individualized assessments claim, because the exceptions at issue "exclude[d] entire, objectively-defined categories of employees from the scope of the statute," and involved "no procedures whereby anyone 'applies' for any of these exemptions." *Id.* The court's discussion gives no indication whether "systems of individualized assessments" trigger the substantial burden inquiry, or describe a form of discrimination.

In *First Covenant Church of Seattle* v. *City of Seattle*, 840 P.2d 174 (Wash. 1992), the Washington Supreme Court relied on *Thornburgh* in concluding that a discretionary landmarking ordinance represented "a system of individualized exceptions." *Id.* at 181. Although the court concluded that such a system was not "generally applicable," the court did not reach that conclusion based on a discussion of equal treatment or discrimination principles. Nor, on the other hand, does the court discuss substantial burden. As in *Thornburgh*, the relationship between "individualized assessments" on the one hand, and discrimination and substantial burden on the other, is left unclear.

Likewise, in *Korean Buddhist Dae Won Sa Temple of Hawaii* v. *Sullivan*, 953 P.2d 1315, 1344 (Haw. 1998), the Hawaii Supreme Court found a discretionary variance procedure to represent a system of individualized assessments, also citing *Thornburgh.*

"Individualized assessments" cases outside the land-use permitting process reflect the same confusion. Like the Ninth Circuit in *Thornburgh,* at least two other Courts of Appeals have focused on discretion and lack of objective standards as the touchstone of a "system of individualized assessments." In *Intercommunity Ctr. for Justice & Peace* v. *INS*, 910 F.2d 42 (2d Cir. 1990), the Second Circuit equated a "system of individualized assessments" with "a discretionary exemption that is applied in a manner that fails to accommodate free exercise concerns." *Id.* at 45.

Similarly, in *Axson-Flynn* v. *Johnson,* 356 F.3d 1277 (10th Cir. 2004), the Tenth Circuit recently reiterated its definition of "a system of individualized exemptions [as] one that 'give[s] rise to the application of a subjective test,' ... one in which case-by-case inquiries are routinely made." *Id.* at 1297 (quoting *Swanson* v. *Guthrie Indep. Sch. Dist. No. I-L,* 135 F.3d 694, 701 (10th Cir. 1998)). Also like *Thornburgh,* but unlike *First Covenant, Axson-Flynn* described "individualized assessments" as one of two "exceptions" to the general rule of *Smith,* rather than as a type of law that is not "generally applicable."

In yet another approach, the Sixth Circuit has focused on whether a system of "individualized exemptions" is applied in a "religion-neutral" way, and especially whether there is "any evidence of discriminatory intent against religion." *Vandiver* v. *Hardin County Bd. of Educ.*, 925 F.2d 927, 934 (6th Cir. 1991). This discrimination focus is especially odd, because the court emphasizes, almost simultaneously, that "individualized assessments" doctrine

does *not* fall within the categories of neutrality or general applicability (or hybrid rights). *Id.* at 933 ("[W]e note that *Smith* does appear to leave open a small crack for free exercise challenges to generally applicable, religion-neutral laws even when such challenges are not joined with an alleged infringement of another constitutional interest.").

At least two other appellate courts similarly emphasize discrimination in their discussions of "individualized assessments." Recently, the California Supreme Court read this term to trigger strict scrutiny "where (1) there is a mechanism of exemptions open to unfettered discretionary interpretation, and (2) the bureaucratic discretion is enforced in a discriminatory manner against religion." *Catholic Charities of Sacramento, Inc.* v. *Superior Court,* 109 Cal. Rptr. 2d 176, 192 (2004). By contrast to the Ninth and Tenth Circuits, however, discretion and subjectivity are not strictly necessary to trigger strict scrutiny on this view; *Catholic Charities* would also apply strict scrutiny to a law creating categorical (*i.e.*,, non-individualized) exceptions for secular conduct, without extending the exception to comparable religious conduct. *Id.* at 193.

The Third Circuit has likewise "held that the neutrality principle applies with equal force when government creates categorical, as opposed to individualized, exceptions for secularly motivated conduct." *Tenafly Eruv Ass'n* v. *Borough of Tenafly,* 309 F.3d 144, 166 (3d Cir. 2002) (citing *Fraternal Order of Police* v. *City of Newark,* 170 F.3d 359, 365 (3d Cir. 1999)). *See also Tenafly,* 309 F.3d at 166 n.27 (noting Third Circuit's difference with Ninth and Tenth Circuits in strictly scrutinizing categorical, as well as individualized, exemptions).

The Third Circuit's view of "individualized assessments" is not only strongly discrimination oriented, it

is strongly opposed to leaving any room for a "substantial burden" analysis after *Smith*. *See Id.* at 170 & n.31 (emphasizing "the Supreme Court's admonition in *Smith* against judicial inquiries into the centrality of religious practices," but citing cases from other jurisdictions assessing whether burden is "substantial"). This conflicts directly with at least the Fourth Circuit, which has acknowledged that the "substantial burden," unemployment compensation cases involving "individualized assessments" were not overruled by *Smith*, and so remain good law. *See Goodall by Goodall* v. *Stafford County Sch. Bd.*, 60 F.3d 168, 173 (4th Cir. 1995). Adding to the confusion, *Goodall* describes these "individualized assessments" cases – where the substantial burdens test still applies – as involving laws that are not "generally applicable." *Id.*

In sum, the Courts of Appeals and state Supreme Courts are all over the lot when it comes to the meaning and legal consequence of the term "system of individualized governmental assessments" within this Court's Free Exercise jurisprudence. That is more than reason enough to grant the writ in this particular case, which raises that question and exemplifies that confusion.

II. THE CONFUSION OVER THE QUESTIONS PRESENTED BY PETITIONERS, AS WELL AS THE MEANING AND CONSEQUENCE OF "INDIVIDUALIZED ASSESSMENTS," IS NOT AN ABSTRACT PROBLEM, BUT INSTEAD BEARS SEVERE CONSEQUENCES FOR RELIGIOUS COMMUNITIES NATIONWIDE, AND ESPECIALLY FOR RELIGIOUS MINORITIES IN THE LAND-USE PERMITTING CONTEXT.

A. Congress Recently Heard "Massive Evidence" That Discretionary Zoning Processes Routinely Enforce the Covert Religious

Biases of Local Government Officials and Private Citizens.

The conflict among the lower courts regarding "individualized assessments" and related issues has given rise to a problem of national importance. As Congress learned during the three years of hearings that prompted the passage of RLUIPA, the kind of religious discrimination that may be hidden behind discretionary processes – especially in the local land-use permitting context – is widespread and unchecked. The failure of the lower courts since *Smith* to strictly scrutinize substantial burdens imposed through such freewheeling processes exacerbates the problem.

The Senate legislative history of RLUIPA summarizes the matter well:

> .... The hearing record compiled massive evidence that this right [to assemble for religious purposes] is frequently violated. Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes *and also in the highly individualized and discretionary processes of land use regulation.* Zoning codes [often] ... permit churches *only with individualized permission from the zoning board, and zoning boards use that authority in discriminatory ways.*
>
> Sometimes, zoning board members or neighborhood residents explicitly offer race or religion as the reason to exclude a proposed church, especially in cases of black churches and Jewish shuls and synagogues. *More often, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or "not consistent with the city's land use plan."* Churches have been

excluded from residential zones because they generate too much traffic, and from commercial zones because they don't generate enough traffic. Churches have been denied the right to meet in rented storefronts, in abandoned schools, in converted funeral homes, theaters, and skating rinks – in all sorts of buildings that were permitted when they generated traffic for secular purposes.

The hearing record contains much evidence that these forms of discrimination are very widespread. Some of this evidence is statistical – from national surveys of cases, churches, zoning codes, and public attitudes. Some of it is anecdotal, with examples from all over the country. Some of it is testimony by witnesses with wide experience who say that the anecdotes are representative. This cumulative and mutually reinforcing evidence is summarized in the report of the House Committee on the Judiciary (House Rep. 106-219) at 18-24, in the testimony of Prof. Douglas Laycock to the Committee on the Judiciary 23-45 (Sept. 9, 1999), and in Douglas Laycock, *State RFRAs and Land Use Regulation,* 32 U.C. DAVIS L. REV. 755, 769-83 (1999).

This discrimination against religious uses is a nationwide problem. It does not occur in every jurisdiction with land use authority, but it occurs in many such jurisdictions throughout the nation. *Where it occurs, it is often covert.* It is impossible to make separate findings about every jurisdiction, or to legislate in a way that reaches only those jurisdictions that are guilty.

146 CONG. REC. S7774-75 (daily ed. July 27, 2000) (Exh. 1, Joint Statement of Senator Hatch and Senator Kennedy on

the Religious Land Use and Institutionalized Persons Act of 2000) (emphasis added).

Fractured opinions among lower courts struggling to interpret a single term is more than sufficient reason to grant the writ. But where, as here, that doctrinal confusion has worsened a deficit in civil rights enforcement – a deficit documented before Congress – the need for this Court's guidance becomes even more acute.

B. The Experience of *Amici* Under RLUIPA Has Confirmed the Evidence Presented to Congress.

Amici are a public interest law firm and various religious organizations that have participated frequently and directly in disputes over the discretionary denial of zoning permits to use land for religious exercise. Their experience since the passage of RLUIPA confirms that those denials occur frequently, often imposing severe restrictions on religious exercise, often for vague or otherwise dubious reasons, and often with expressions of animus which, unfortunately, are insufficient alone to make out a claim of discrimination. That experience is summarized in the attached appendices, which list some recent challenges to discretionary denials of permits to use land for religious exercise. Appendix A lists disputes that are documented in judicial decisions, and Appendix B lists disputes that are pending or have settled without decision. This experience underscores that the confusion regarding whether "individualized assessments" should be construed to cover fact patterns like these has concrete and urgent consequences in the lives of thousands, if not millions, of Americans.

CONCLUSION

For the foregoing reasons, the writ should be granted.

Respectfully submitted,

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APPENDIX A

PARTIAL LIST OF DISCRETIONARY DENIALS OF PERMITS TO ALLOW RELIGIOUS EXERCISE ON LAND, AS DOCUMENTED IN JUDICIAL DECISIONS

• *Congregation Kol Ami* v. *Abington Tp.*, 309 F.3d 120 (3d Cir. 2002) (challenging discretionary denial of continuing use, special exception, and variance to allow synagogue to use former convent and chapel facility as place of worship)
• *Dilaura* v. *Ann Arbor Charter Tp.*, 30 Fed. Appx. 501 (6th Cir. 2002) (challenging discretionary denial of variance to use existing large house for retreats)
• *Castle Hills First Baptist Church* v. *City of Castle Hills*, No. SA-01-CA-1149-RF, ___ F. Supp. 2d ___, 2004 WL 546792 (W.D. Tex. Mar. 17, 2004) (challenging discretionary denial of permits to use existing building for youth ministry, and to use existing lot for parking)
• *Guru Nanak Sikh Society* v. *County of Sutter*, No. S-02-1785, slip op. (E.D. Cal. Nov. 19, 2003) (challenging discretionary denial of permit to start Sikh temple in residential neighborhood)
• *Elsinore Christian Center* v. *City of Lake Elsinore*, 291 F. Supp. 2d 1083 (C.D. Cal. 2003) (challenging discretionary denial of use permit to relocate church in former grocery store)
• *Westchester Day School* v. *Village of Mamaroneck*, 280 F. Supp. 2d 230 (S.D.N.Y. 2003) (challenging discretionary denial of use permit to expand overcrowded Orthodox Jewish school facilities)
• *Grace United Methodist* v. *Cheyenne*, 235 F. Supp. 2d 1186, 1188 (D. Wy. 2002) (challenging discretionary denial of permit to operate church's day care facility)

• *Hale O Kaula* v. *Maui Planning Comm'n,* 223 F. Supp. 2d 1056 (D. Haw. 2002) (challenging discretionary denial of use permit to relocate church to agricultural land to enable farming ministry)
• *Cottonwood Christian Center* v. *City of Cypress,* 218 F. Supp. 2d 1203 (C.D. Cal. 2002) (challenging discretionary denial of use permit to relocate from overcrowded facilities, and challenging attempted taking of new property)
• *Freedom Baptist Church* v. *Tp. of Middletown,* 204 F. Supp. 2d 857 (E.D. Pa. 2002) (challenging discretionary denial of variance to allow small church to continue using office space for worship)
• *Shepherd Montessori Center Milan* v. *Ann Arbor Charter Township,* Nos. 233484, 234300, ___ N.W.2d ___, 2003 WL 22520439 (Mich. Ct. App. Nov. 6, 2003) (challenging discretionary denial of permit to establish religious day care facility)

APPENDIX B

PARTIAL LIST OF DISCRETIONARY DENIALS OF PERMITS TO ALLOW RELIGIOUS EXERCISE ON LAND, AS DOCUMENTED IN CASES PENDING OR SETTLED WITHOUT DECISION

• *Cedar Rapids Zen Center* v. *City of Cedar Rapids*, No. 02-CV-115 (N.D. Iowa) (challenging discretionary denial of permit to conduct meditation services in plaintiffs' home)
• *Chabad-Lubavitch* v. *City of Newton, et al.*, No. 295600 (Mass. Cmwlth. Land Ct.) (challenging discretionary refusal to waive parking space requirement for Orthodox synagogue whose members are not permitted to drive on the Sabbath)
• *City of New York* v. *Abundant Life Alliance Church of New York*, Index No. 8151/03 (N.Y.S.) (challenging discretionary denial of special permit for use of condominium as site of religious worship)
• *Congregation Etz Chaim* v. *City of Los Angeles*, CCV-97-5042-HLH (C.D. Cal.) (challenging discretionary denial of conditional use permit to allow Orthodox Jewish congregation in residential area)
• *Court Street Christian Church of Salem, Oregon* v. *City of Salem*, No. 02-CV-6292-HO (D. Ore.) (challenging discretionary denial of application for conditional use permit to expand sanctuary)
• *Dedicated to Youth Ministries* v. *City of Berwyn, et al.*, No. 03-CH-07101 (Cir. Ct., Cook Cy., Ill.) (challenging discretionary denial of conditional use permit to operate "coffee-house teen center" in existing church facility)
• *Great Lakes Society* v. *Georgetown Charter Township*, No. 03-4599-AA (Cir. Ct., Ottowa Cy., Mich.), (challenging discretionary denial of application for permit to use building for religious assembly)

• *Haven Shores Community Church* v. *City of Grand Haven,* No. 1:00-CV-175 (W.D. Mich.) (challenging discretionary denial of variance to allow storefront church to worship in storefront property)
• *Hyde Park Baptist Church* v. *City of Austin, Texas*, A-0-CA-212-JN (W.D. Tex.) (challenging discretionary suspension of permit to build parking lot)
• *International Church of the Foursquare Gospel* v. *City of Euless*, No. 4:03-cv-00121 (N.D. Tex.) (challenging discretionary denial of specific use permit to allow religious use of former grocery store)
• *Missionaries of Charity, Brothers* v. *City of Los Angeles*, No. 01-CV-8115 (C.D. Cal.) (challenging discretionary denial of permit and variance to allow ongoing religious worship and service activities)
• *Philadelphia's Church of Our Savior* v. *Concord Township*, No. 03-1766 (E.D. Pa.) (challenging discretionary denial of permit to build church)
• *Primera Iglesia Bautista Hispana* v. *Broward County*, No. 01-CV-6530 (S.D. Fla.) (challenging denial of permit and variance to rent house for religious use)
• *Refuge Temple Ministries of Atlanta* v. *City of Forest Park*, No. 1:01-CV-0958 (N.D. Ga.) (challenging discretionary denial of permit to hold services in commercial district)
• *Temple B'nai Sholom* v. *City of Huntsville,* CV-01-S-1412-NE (N.D. Ala.) (challenging discretionary denial of permit to demolish building to allow synagogue expansion)
• *Unitarian Universalist Church of Akron* v. *City of Fairlawn*, No. 5:00-CV-3021 (N.D. Ohio) (challenging discretionary denial of permit to build fellowship hall)

No. 03-1397 (3)

IN THE
Supreme Court of the United States

Supreme Court, U.S.
FILED
MAY 7 - 2004
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CHRIST CENTER, CHRISTIAN COVENANT OUTREACH CHURCH, HIS WORD MINISTRIES TO ALL NATIONS, CHRISTIAN BIBLE CHURCH, MONTE DE SION (MOUNT ZION) CHURCH, AND CIVIL LIBERTIES FOR URBAN BELIEVERS,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF AMERICAN JEWISH CONGRESS; BAPTIST GENERAL CONFERENCE; THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; EVANGELICAL LUTHERAN CHURCH IN AMERICA; GENERAL COUNCIL ON FINANCE AND ADMINISTRATION OF THE UNITED METHODIST CHURCH; CLIFTON KIRKPATRICK, AS THE STATED CLERK OF THE PRESBYTERIAN CHURCH (U.S.A.); GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS; FIRST JURISDICTION OF ILLINOIS, CHURCH OF GOD IN CHRIST; FOUNDATION FOR THE PRESERVATION OF THE MAHAYANA TRADITION, INC.; INTERNATIONAL CHURCH OF THE FOURSQUARE GOSPEL; UNION OF MESSIANIC JEWISH CONGREGATIONS; AND WORLDWIDE CHURCH OF GOD AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

IN THE

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CHRIST CENTER, CHRISTIAN COVENANT OUTREACH CHURCH, HIS WORD MINISTRIES TO ALL NATIONS, CHRISTIAN BIBLE CHURCH, MONTE DE SION (MOUNT ZION) CHURCH, AND CIVIL LIBERTIES FOR URBAN BELIEVERS,

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Amici curiae American Jewish Congress; Baptist General Conference; The Church of Jesus Christ of Latter-day Saints; Evangelical Lutheran Church in America; General Council on Finance and Administration of the United Methodist Church; Clifton Kirkpatrick, as the Stated Clerk of the Presbyterian Church (U.S.A.); General Conference of Seventh-day Adventists; First Jurisdiction of Illinois, Church of God in Christ; Foundation for the Preservation of the Mahayana Tradition, Inc.; International Church of the Foursquare Gospel; Union of Messianic Jewish Congregations; and Worldwide Church of God respectfully request leave of this Court to file the following brief in the above-captioned matter. In support of this motion, *amici curiae* state as follows:

The petitioners have granted their written consent to the filing of briefs *amici curiae*, which consent is on file with this Court. The United States, which is listed on this Court's docket as a respondent, has also consented to the filing of this brief. Respondent City of Chicago has withheld its consent, necessitating this motion.

Amici are national and regional religious organizations, with millions of members, that support an interpretation of the Free Exercise Clause of the First Amendment and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc ("RLUIPA"), which provides meaningful protections for religious land uses. *Amici* are concerned that the decision below, which sets an excessively high threshold for bringing free exercise and RLUIPA claims, will have nationwide adverse consequences on the ability of religious organizations to construct houses of worship and religious instruction. Accordingly, *amici* support the petition for a writ of certiorari.

As religious organizations whose members or affiliates depend on religious meetinghouses for the exercise of their respective religions, each of the *amici* also has a direct and vital interest in the proper interpretation and application of

constitutional and statutory protections for religious land uses. The specific interests of the *amici* are set forth in the addendum to the brief.

For the foregoing reasons, the motion for leave to file the attached brief of *amici curiae* should be granted.

Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI* 1

REASONS FOR GRANTING THE PETITION 1

I. THIS COURT'S REVIEW IS NEEDED BECAUSE THE DECISION BELOW SEVERELY UNDERMINES VITAL CONSTITUTIONAL AND STATUTORY PROTECTIONS FOR RELIGIOUS LAND USE 2

A. Discriminatory and Arbitrary Land Use Regulations Create Significant Religious Hardships 2

B. The Decision Below Sets the Threshold for Finding a Substantial Burden So High that the Protections of the Free Exercise Clause and RLUIPA Are Often Rendered Meaningless 11

II. THIS COURT'S REVIEW IS NEEDED TO RESOLVE INTOLERABLE CONFUSION AND CONFLICTS IN THE LOWER COURTS OVER THE MEANING OF "SUBSTANTIAL BURDEN" UNDER THE FREE EXERCISE CLAUSE AND RLUIPA 14

A. The Lower Courts Are Deeply Conflicted Over What Constitutes a "Substantial Burden," with Courts Generally Divided Between High- and Medium-Threshold Standards 14

B. In the Religious Land Use Context, Conflicting Substantial Burden Standards Produce Different Substantive Results Even Under Closely Analogous Facts 17

TABLE OF CONTENTS – continued

Page

C. The High Threshold Established by the Decision Below Conflicts in Principle with this Court's Prior Decisions and Teachings Concerning Substantial Burden..... 19

CONCLUSION..... 20

TABLE OF AUTHORITIES

CASES Page

Am. Friends of the Soc'y of St. Pius v. *Schwab*, 417 N.Y.S. 2d 991 (N.Y. App. Div. 1979) 9
Boyajian v. *Gatzunis*, 212 F.3d 1 (1st Cir. 2000).... 7
Castle Hills First Baptist Church v. *City of Castle Hills*, ___ F.Supp.2d ___, 2004 WL 546792, (W.D. Tex. Mar. 17, 2004) 17
Church of the Lukumi Babalu Aye v. *City of Hialeah*, 508 U.S. 520 (1993)..... 19
Corporation of the Presiding Bishop v. *City of West Linn*, 86 P.3d 1140 (Or. App. 2004) ... 10, 13, 14
Cottonwood Christian Center v. *Cypress Redev. Agency*, 218 F.Supp.2d 1203 (C.D. Cal. 2002) 18
Employment Division v. *Smith*, 494 U.S. 872 (1990)..... 15, 19, 20
First Covenant Church v. *City of Seattle*, 840 P.2d 174 (Wash. 1992) 4, 16, 18
Freedom Baptist Church of Delaware Cnty v. *Township of Middletown*, 204 F.Supp.2d 857 (E.D. Pa. 2003) 6
Grosz v. *City of Miami Beach*, 721 F.2d 729 (11th Cir. 1983)..... 16
Guru Nanak Sikh Soc'y of Yuba City v. *County of Sutter*, No. Civ. S-02-1785 (E.D. Cal. Nov. 19, 2003)..... 6, 14
Henderson v. *Kennedy*, 253 F.3d 12 (D.C. Cir.), *reh'g denied*, 265 F.3d 1072 (D.C. Cir. 2001)..... 15
Hicks v. *Garner*, 69 F.3d 22 (5th Cir. 1995)..... 14
Islamic Center of Mississippi, Inc. v. *City of Starkville*, 840 F.2d 293 (5th Cir. 1988)..... 16, 17, 18
Konikov v. *Orange County Fla.*, 302 F.Supp.2d 1328 (M.D. Fla. 2004) 13

TABLE OF AUTHORITIES – continued

Page

Life Teen, Inc. v. Yauapi County, No. Civ. 01-1490 slip op (D. Ariz. Mar 26, 2003 6

Mack v. *O'Leary*, 80 F.3d 1175 (7th Cir. 1996), *vacated on other grounds*, 521 U.S. 507 (1997) 14

Midrash Sephardi, Inc. v. *Town of Surfside*, ___ F.3d ___, 2004 WL 842527, (11th Cir. Apr. 21, 2004) 12, 15, 16, 18

Murphy v. *Zoning Comm'n of Town of New Milford*, 289 F.Supp.2d 87 (D. Conn. 2003) 6, 18

Orthodox Minyan of Elkins Park v. *Cheltenham Twp. Zoning Hearing Bd.*, 552 A.2d 772 (Pa. Commw. 1989) 7

Rector, Warden & Members of Vestry v. *City of New York*, 914 F.2d 348 (2d Cir. 1990) 15

San Jose Christian College v. *City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004) 13, 15

Sherbert v. *Verner*, 374 U.S. 398 (1963) 15

Society of Jesus of New England v. *Boston Landmarking Comm.*, 564 N.E.2d 571 (Mass. 1990) 4

Thomas v. *Review Board of Indiana*, 450 U.S. 707 (1981) 15

Thiry v. *Carlson*, 78 F.3d 1491 (10th Cir. 1996) 15, 16, 18

Vision Church, United Methodist v. *Village of Long Grove*, No. 03 C 5761 (N.E. Ill. 2003) 11

Westchester Day School v. *Village of Mamaroneck*, 280 F.Supp.2d 230 (S.D. N.Y. 2003), *appeal docketed*, No. 03-9042 (2d Cir. Oct. 8, 2003) 17

TABLE OF AUTHORITIES – continued

STATUTES Page

RLUIPA, Pub. L. No. 106-274, 114 Stat. 803 (2000) 11
42 U.S.C. §§ 2000bb to 2000bb-4 11
42 U.S.C. §§ 2000cc to 2000cc-5 11
42 U.S.C. § 2000cc(b)(3) 16
42 U.S.C. § 2000cc-3(g) 11
42 U.S.C. § 2000cc-5(7) 11

LEGISLATIVE HISTORY

Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong. (1998) 6
H.R. Rep. No. 106-219 (1999) 5, 6, 7
146 Cong. Rec. E1234 (daily ed. July 14, 2000) 6
146 Cong. Rec. S7774 (daily ed. July 27, 2000) 3, 6, 8, 11

MISCELLANEOUS

Douglas Laycock, *State RFRAs and Land Use Regulation,* 32 U.C. Davis L. Rev. 755 (1999) 6, 7, 8
Von G. Keetch & Matthew K. Richards, *The Need for Legislation to Enshrine Free Exercise,* 32 U.C. Davis L. Rev. 725 (1999) 8
Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 Harv. L. Rev. 1175 (1996) 18
Roman P. Storzer & Anthony R. Picarello, Jr. *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices,* 9 Geo. Mason L. Rev. 929 (2001) 3, 4

INTEREST OF THE *AMICI*[1]

The interest of the *amici* is set forth in the accompanying motion for leave to file and in the addendum to this brief.

REASONS FOR GRANTING THE PETITION

Religious organizations seeking to construct or renovate religious meetinghouses often experience unreasonable hostility and opposition from local land use bodies. The biggest problem is land use standards that grant regulators virtually limitless discretion to reject religious land uses for wholly arbitrary or even invidious reasons, coupled with extremely deferential standards of judicial review. In response to this nationwide problem, Congress enacted RLUIPA to subject discretionary land use decisions to meaningful judicial review. *Amici* and numerous other religious land users depend heavily on RLUIPA's protections.

The decision below will have nationwide adverse consequences on the ability of religious organizations to construct houses of worship. As demonstrated in the petition and in Judge Posner's dissent below, the Seventh Circuit's decision, in conflict with other decisions around the country, makes it unreasonably difficult for a religious body to challenge a land use measure under equal protection principles. *Amici* agree with Judge Posner on this point and urge the Court to grant review of that issue.

The other issue presented, however, is of even greater practical significance, and will therefore be the focus of this brief. Specifically, the decision below creates such a high standard for establishing when land use decisions impose a substantial burden on religious exercise that the protections of

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[1] Counsel for *amici* state that they authored this brief in whole and that no person or entity, other than *amici*, made a monetary contribution to the preparation or submission of this brief.

the Free Exercise Clause and RLUIPA would often be rendered meaningless. As demonstrated below, this standard conflicts with the decisions of other circuits and lower courts, is contrary in principle to this Court's prior decisions and teachings, and violates the express intent of Congress in enacting RLUIPA. *Amici* urge this Court to grant the petition to resolve these conflicts and to reaffirm a substantial burden test consistent with this Court's prior free exercise jurisprudence and the stated purpose of RLUIPA.

I. THIS COURT'S REVIEW IS NEEDED BECAUSE THE DECISION BELOW SEVERELY UNDERMINES VITAL CONSTITUTIONAL AND STATUTORY PROTECTIONS FOR RELIGIOUS LAND USE.

A. Discriminatory and Arbitrary Land Use Regulations Create Significant Religious Hardships.

1. The right to worship God according to one's own conscience is fundamental. For tens of millions of Americans, "worship" means worship in community – in chapels, synagogues and other religious meetinghouses, in the communion and strength of fellow believers. In many faiths, vital elements of worship can only be experienced in community. A sermon or homily has little significance without an audience. Religious ceremonies and sacraments are usually performed in a communal context. Prayer meetings, Bible study sessions, and religious choirs are but a few of many examples of group worship and religious exercise. As believers worship together, religious exercise acquires meaning and significance that transcend the individual.

The ability to erect religious meetinghouses where communities of faith may gather and worship is therefore indispensable to religious liberty. "The physical embodiment of a religious group – its church – represents its ability to

speak, assemble, and worship together: three fundamental rights embodied in the First Amendment." Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices* [hereinafter "Storzer & Picarello"], 9 Geo. Mason L. Rev. 929, 945 (2001). As Congress found in enacting RLUIPA, "[c]hurches and synagogues cannot function without a physical space adequate to their needs and consistent with their theological requirements." 146 Cong. Rec. S7774 (daily ed. July 27, 2000).

When land use regulators prohibit or significantly constrain the construction or renovation of a house of worship, they often impose considerable religious hardships. This may be true because the prohibition results in people literally having no place to worship; in such instances, the land use regulation is a direct prohibition on the free exercise of religion. But religious hardship can also arise where regulatory obstacles bar the construction or expansion of a house of worship that is necessary to alleviate overcrowding, reasonably accommodate new members, or enable certain religious practices.

The mere fact that it is physically possible for current and prospective members of a church[2] to cram into an existing or makeshift meetinghouse does not imply that denying the right to build or adequately expand a house of worship creates no hardship. Overcrowding can be a significant impediment to religious exercise. Lack of seating in the main sanctuary inevitably forces some congregants to stand in foyers and hallways, precluding direct participation in worship services. Essential religious courses cannot be taught to everyone interested. Prospective members become discouraged because the congregation has no room for them. Parents lack

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[2] The term "church" is used inclusively to refer to religious organizations generally, whether Christian, Jewish, Muslim, Buddhist, Hindu, etc.

adequate space to care for restless children. The quality of services and the contemplative atmosphere conducive to worship suffer.

Similarly, the design of churches is "freighted with religious meaning," and particular liturgies require particular building designs. *First Covenant Church* v. *Seattle*, 840 P.2d 174, 182 (Wash. 1992); *Society of Jesus of New England* v. *Boston Landmarking Comm.*, 564 N.E.2d 571, 573 (Mass. 1990). Such features as the sanctuary, altar, steeple, counseling rooms, and classrooms all are critical to religious practice. Restricting the construction or expansion of churches to preclude any of these necessary features can greatly burden religious exercise. In brief, substantial religious hardships often arise when regulators significantly constrain a church's ability to construct adequate facilities.

2. Municipal land use regulators are often hostile toward religious land uses, or at a minimum insensitive to the religious hardships just described. In the experience of these *amici*, discriminatory and arbitrary treatment of religious land uses by municipalities poses significant obstacles to religious exercise. Religious organizations of all faiths face widespread and increasing pressure by municipal authorities nationwide to limit their physical presence in America's cities and towns. See, *e.g.*, Storzer & Picarello, 9 Geo. Mason L. Rev. at 929.

Prior to the enactment of RLUIPA, during nine hearings over three years, Congress amassed substantial evidence of pervasive religious discrimination and violations of free exercise rights in the land use area, especially in respect to minority faiths. As summarized by Senators Kennedy and Hatch in their Joint Statement in support of RLUIPA:

> The hearing record compiled massive evidence that this right [freedom to worship] is frequently violated. Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated

against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation. Zoning codes frequently exclude churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes. Or the codes permit churches only with individualized permission from the zoning board, and zoning boards use that authority in discriminatory ways.

Sometimes, zoning board members or neighborhood residents explicitly offer race or religion as the reason to exclude a proposed church, especially in cases of black churches and Jewish shuls and synagogues. More often, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or "not consistent with the city's land use plan." Churches have been excluded from residential zones because they generate too much traffic, and from commercial zones because they don't generate enough traffic. Churches have been denied the right to meet in rented storefronts, in abandoned schools, in converted funeral homes, theaters, and skating rinks – in all sorts of buildings that were permitted when they generated traffic for secular purposes.

The hearing record contains much evidence that these forms of discrimination are very widespread. Some of this evidence is statistical – from national surveys of cases, churches, zoning codes, and public attitudes. Some of it is anecdotal, with examples from all over the country. Some of it is testimony by witnesses with wide experience who say that the anecdotes are representative. This cumulative and mutually reinforcing evidence is summarized in the report of the House Committee on the Judiciary (House Rep. 106-219) at 18-24, in the testimony of Prof. Douglas Laycock to the Committee on the Judiciary 23-45 (Sept.

9, 1999), and in Douglas Laycock, State RFRAs and Land Use Regulation, 32 U.C. Davis L. Rev. 755, 769-83 (1999).

146 Cong. Rec. S7774.[3]

In addition to laws with an overtly anti-religious purpose, congressional hearings uncovered many ostensibly benign land use laws that are systematically applied to reach anti-religious results. For example, a survey of twenty-nine zoning codes from suburban Chicago indicated that in twelve of these codes churches (unlike other assembly uses) could not locate *anywhere* as of right without a special use permit, giving regulators wide discretion over religious land use.[4] Witnesses repeatedly testified about regulators barring churches from worshipping in buildings previously used by non-religious assemblies and of instances where non-religious assemblies were not subject to the same restrictions.[5]

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[3] *See also* H.R. Rep. No. 106-219, at 17-24 (1999) (summarizing hearing testimony); *see generally* Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong. (1998); *see also Guru Nanak Sikh Soc'y of Yuba City* v. *County of Sutter*, No. Civ. S-02-1785, slip op. at 43 (E.D. Cal. Nov. 19, 2003) (relying on the Joint Statement); *Murphy* v. *Zoning Comm'n of Town of New Milford*, 289 F.Supp.2d 87, 118 (D. Conn. 2003) (same); *Freedom Baptist Church of Delaware Cnty* v. *Township of Middletown*, 204 F.Supp.2d 857, 861-63 (E.D. Pa. 2003) (same).

[4] *See* H.R. Rep. No. 106-219, at 18; 146 Cong. Rec. E1234, E1235 (daily ed. July 14, 2000) (statement of Rep. Canady); Douglas Laycock, *State RFRAs and Land Use Regulation* [hereinafter "Laycock"], 32 U.C. Davis L. Rev. 755, 773-74 (1999) (summarizing congressional record; Laycock's article was incorporated into the congressional record at 146 Cong. Rec. S7774).

[5] H.R. Rep. No. 106-219, at 19, 21, 23; *Life Teen, Inc.* v. *Yavapi County*, No. Civ 01-1490, slip op. at 32 (D. Ariz. Mar. 26, 2003) ("Congress found that the vague, discretionary, and subjective standards applied to land use decisions resulted in widespread discriminatory application of land use regulations to religious assemblies.").

Congress found that some municipalities totally exclude new churches by cleverly authorizing religious uses only in places where churches already exist. Thus, "[t]he code shows multiple sites for churches but in fact all new churches are totally excluded." Laycock, 32 U.C. Davis L. Rev. at 773-74; H.R. Rep. No. 106-219, at 19.

Congress also found, as the First Circuit recently summarized, the increasingly common "phenomenon of churches being unwanted either in residential areas – because of increased traffic or noise, or impact on aesthetics – or in business zones – because tax-exempt churches dampen the vibrancy of commercial development." *Boyajian* v. *Gatzunis*, 212 F.3d 1, 8 (1st Cir. 2000). Opposition to new churches in residential zones is of course familiar. For example, Congress heard about *Orthodox Minyan of Elkins Park* v. *Cheltenham Twp. Zoning Hearing Bd.*, 552 A.2d 772 (Pa. Commw. 1989), where the zoning board denied an application of an Orthodox Jewish congregation because the proposed building lacked parking spaces – even though such spaces were unnecessary since Orthodox Jews do not drive on the Sabbath – but when the congregation amended its proposal to include added spaces, the board again denied the application because it would generate too much traffic. H.R. Rep. No. 106-219, at 23. But Congress also found that "increasing numbers of the recent cases involve opposition to churches in commercial zones, or even industrial zones" because officials oppose taking such lands off the tax rolls. Laycock, 32 U.C. Davis L. Rev. at 761. As Professor Laycock has noted, the "practical effect [of this] is continuous opposition to any new places of worship, with local officials offering real or imagined or wholly phony land use concerns as a subterfuge to fight the state legislature's policy of tax exemption," resulting in "widespread political and governmental opposition to the exercise of a core First Amendment right." *Id.* at 761-62.

Independent studies have confirmed these problems and the religious hardships they impose. One study demonstrated an overwhelming, nationwide pattern of discrimination in zoning decisions involving small religious groups. *Id.* at 770-71; see Von G. Keetch & Matthew K. Richards, *The Need for Legislation to Enshrine Free Exercise*, 32 U.C. Davis L. Rev. 725, 731 (1999) (describing study: fully one-half to two-thirds of reported cases involve minority religions). As Congress found, new, unfamiliar, and minority faiths are particularly vulnerable to unconstitutional treatment at the hands of land use regulators. See *supra* 146 Cong. Rec. S7774. And yet every denomination is in the minority somewhere in the country and thus vulnerable to such treatment. One survey demonstrated that arbitrary land use treatment is far more prevalent, even with respect to familiar mainline denominations, than the case law suggests, with reported cases being just the "tip of the iceberg." Laycock, 32 U.C. Davis L. Rev. at 772-73.

3. Based on their on-going experience with numerous land use bodies across the nation, *amici* can attest that congressional concerns about religious hardships arising from discriminatory and arbitrary treatment of religious land uses were well founded. Too frequently *amici* encounter outright anti-religious bias and discrimination, sometimes directed toward religious land uses generally and sometimes directed specifically at our particular faith communities. Occasionally that bias is overt and easily discernable, but most often it is difficult to prove even when clearly present; local land use bodies are usually too sophisticated to include evidence of their own bias in the record. As one court accurately noted:

> Human experience teaches us that public officials, when faced with pressure to bar church uses by those residing in a residential neighborhood, tend to avoid any appearance of an antireligious stance and temper their decision by carefully couching their grounds for refusal to permit such use in terms of traffic dangers, fire

> hazards and noise and disturbance, rather than on such crasser grounds as lessening of property values or loss of open space or entry of strangers into the neighborhood or undue crowding of the area.

Am. Friends of the Soc'y of St. Pius v. *Schwab*, 417 N.Y.S.2d 991, 993 (N.Y. App. Div. 1979). Where residential zones are at issue, *amici* have found that land use officials commonly undervalue the religious needs of churches and dramatically overvalue the minor, even trivial, concerns of neighbors who oppose anything but purely residential development.

Amici can also confirm congressional findings that municipalities increasingly seek to exclude churches from commercial and industrial zones as allegedly inconsistent with their business development and tax collection agendas. Land use officials often fight tooth and nail to hinder the construction or expansion of much-needed houses of worship, whether in residential, commercial, or industrial districts. Two representative examples illustrate the types of obstacles *amici* routinely face.

a. *The Church of Jesus Christ of Latter-day Saints.* In 2002, after an extensive search for appropriate property, the Church of Jesus Christ applied to build a 16,558 sq. foot meetinghouse on a 3.85-acre parcel in a residential area of the City of West Linn, Oregon. The Church needed the meetinghouse because its West Linn members had no place within city limits to worship and because the meetinghouse in the neighboring city had become very overcrowded. The Church designed the building to specifically address the religious needs of its local members; literally every element of the building was necessary for religious worship, instruction, or ministry. Under city zoning law, houses of worship are not permitted outright anywhere in the city but are conditional uses. The proposed church complied with all objective zoning standards and land use regulations pertaining to size, height, parking, and so forth, and the Church repeatedly expressed its willingness to comply with any

reasonable requirement to mitigate subjective aesthetic and design concerns. After the Church agreed to extensive landscaping and other conditions, the city's professional planning staff recommended granting a conditional use permit.

However, implacable neighborhood opposition arose to any Church meetinghouse on the property. The city rejected the planning staff's recommendation and denied the application despite the Church's religious needs. Officials based their decision on amorphous and wholly subjective criteria, such as that the proposal did not provide "adequate area for aesthetic design treatment." See *Corporation of the Presiding Bishop* v. *City of West Linn*, 86 P.3d 1140, 1142 (Or. App. 2004).

b. *Vision Church, United Methodist.* In 2000, Vision United Methodist Church, a predominantly Korean congregation, purchased a vacant 27-acre parcel in a relatively rural suburban area of unincorporated Lake County, Illinois, just outside the Village of Long Grove. Because many of its members lived near Long Grove and its current meetinghouse was too small, the Church sought to construct a new house of worship on the parcel. Village planners led the Church to believe it could easily obtain land use approval, so the Church applied for Village annexation of the property, an appropriate zoning designation, and permission to build. However, opposition from Village officials and citizens, some of it laced with thinly veiled racial slurs and innuendos, was intense and the application was rejected. Land use officials questioned whether it was proper for a church comprised primarily of non-residents to be located in their Village.

The Church then applied to Lake County for the requisite land use approvals. But when County approval was imminent, the Village changed course and forcibly annexed the land. The Village then amended its zoning ordinance to preclude construction of any kind of church on the parcel. The amendment also had the effect of preventing the Church from constructing its church anywhere in the Village. As a

result, Church members were forced to share worshiping space in an old and cramped facility already used by another congregation, preventing many of its planned ministries and religious activities. See *Vision Church, United Methodist* v. *Village of Long Grove*, No. 03 C 5761 (N.E. Ill. 2003).

B. The Decision Below Sets the Threshold for Finding a Substantial Burden So High that the Protections of the Free Exercise Clause and RLUIPA Are Often Rendered Meaningless.

In response to these types of problems, Congress unanimously passed and President Clinton signed RLUIPA, Pub. L. No. 106-274, 114 Stat. 803 (2000), codified at 42 U.S.C. §§ 2000cc to 2000cc-5. RLUIPA protects religious land use from discriminatory and arbitrary treatment by subjecting discretionary land use decisions that substantially burden the exercise of religion to strict scrutiny. See *id.* RLUIPA also requires that its provisions be "construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g).

RLUIPA's substantial burden test was primarily intended to weed out tenuous claims based on minor or incidental burdens that are inherent in any land use system, while still preserving a remedy for claims involving actual religious hardship. Although RLUIPA defines religious exercise to include the construction or use of a house of worship, 42 U.S.C. § 2000cc-5(7), it does not specify what qualifies as a "substantial burden" on the exercise of religion. Nevertheless, Congress clearly intended that term to be interpreted in accordance with this Court's past decisions. See 146 Cong. Rec. S7774, S7776 (daily ed. July 27, 2000).

The substantial burden test has a significant pedigree in this Court's free exercise jurisprudence and in other decisions applying the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb to 2000bb-4. As explained in greater

detail below, this Court has always defined substantial burden to include cases of bona fide religious hardship – where state action makes religious exercise significantly more difficult or costly. (See *infra*, Section II.C.) To be sure, the precise rubric for determining substantial burden has varied in this Court's decisions.[6] But this Court has never conditioned judicial review under the Free Exercise Clause on the state barring a religious practice or making it effectively impossible, and it is clear that Congress did not intend to adopt so high a standard when it passed RLUIPA.

Nevertheless, the Seventh Circuit has established an extremely exacting substantial burden standard. The decision below requires that the challenged land use regulation "necessarily bear[] direct, primary, and fundamental responsibility for rendering religious exercise – including the use of real property for the purpose thereof within the regulated jurisdiction generally – effectively impracticable." Pet. App. 13a. Hence, even though the burden imposed by the Chicago ordinance at issue here was, as Judge Posner noted, "formidable" and "severe" (*id.* at 35a (Posner, J., dissenting)), under the Seventh Circuit's standard it would still be insufficient to constitute a substantial burden under RLUIPA. Indeed, the standard adopted below is so difficult for churches to satisfy that it renders federal protections for religious land uses almost meaningless, leaving churches defenseless in the face of the very arbitrariness and discrimination Congress intended RLUIPA to remedy. Unfortunately, the Seventh Circuit's approach to substantial

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[6] The variety of formulations this Court has used has engendered some confusion in the lower courts. For example, the Eleventh Circuit recently observed that "[t]he Court's articulation of what constitutes a 'substantial burden' has varied over time." *Midrash Sephardi, Inc.* v. *Town of Surfside*, ___ F.3d ___, 2004 WL 842527, *8 (11th Cir. Apr. 21, 2004). An additional benefit of certiorari is the opportunity to clarify the law in this important area.

burden been adopted by a number of courts already[7] and is now routinely advanced by land use regulators seeking to avoid RLUIPA's protections.

For example, the Seventh Circuit's standard would preclude a RLUIPA claim against a municipality that arbitrarily mandated a large reduction in the size of a proposed chapel. Even if the proposed structure were fully compliant with objective zoning standards and even if the reduction significantly inhibited religious exercise, the bare fact that parishioners could still worship in a smaller chapel would preclude any judicial review whatsoever under the Free Exercise Clause or RLUIPA. Moreover, no matter how great the religious hardship and how arbitrary the reasons, under the Seventh Circuit's standard the municipality could simply deny the application altogether as long as it left open at least one other place to build "within the regulated jurisdiction." Pet. App. 13a. RLUIPA would not even be triggered.

The decision below reduces the First Amendment's free exercise guarantee and RLUIPA's powerful safeguards against arbitrary land use regulations into an easily satisfied technicality that regulators not make a religious practice effectively impossible within an entire jurisdiction. This approach vitiates essential protections for religious land use and will result in the abridgment of basic religious freedoms. In fact, that is already occurring even outside the Seventh Circuit as courts adopt its standard. In the West Linn Oregon situation described above, for instance, the Court of Appeals of Oregon ultimately rejected the church's RLUIPA claim based on the Seventh Circuit's approach. The court held that because church members had not yet been turned away at the overcrowded meetinghouse in the neighboring town, and

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[7] *See San Jose Christian College* v. *City of Morgan Hill*, 360 F.3d 1024, 1035 (9th Cir. 2004); *Konikov* v. *Orange County, Fla.*, 302 F.Supp.2d 1328, 1344-45 (M.D. Fla. 2004); *City of West Linn*, 86 P.3d at 1152-53, 1157 (Or. App. 2004).

because the city had not foreclosed another application, the church's religious exercise was not substantially burdened. *City of West Linn*, 86 P.3d at 1156-57 (relying on the Seventh Circuit's decision).

This Court's review is necessary to address an issue of fundamental importance to religious organizations across the nation.

II. THIS COURT'S REVIEW IS NEEDED TO RESOLVE INTOLERABLE CONFUSION AND CONFLICTS IN THE LOWER COURTS OVER THE MEANING OF "SUBSTANTIAL BURDEN" UNDER THE FREE EXERCISE CLAUSE AND RLUIPA.

A. The Lower Courts Are Deeply Conflicted Over What Constitutes a "Substantial Burden," with Courts Generally Divided Between High- and Medium-Threshold Standards.

To make matters worse, widespread confusion exists in the lower courts as to what constitutes a substantial burden on religious exercise, with standards and formulations varying greatly from case to case. Numerous lower courts have noted the confusion in their attempt to define the proper standard. See, *e.g.*, *Mack* v. *O'Leary*, 80 F.3d 1175 (7th Cir. 1996), *vacated on other grounds*, 521 U.S. 507 (1997); *Hicks* v. *Garner*, 69 F.3d 22, 26 (5th Cir. 1995) (reviewing different approaches of the circuit courts).[8] Generally, the lower courts are divided between high-threshold and moderate-threshold standards for satisfying the substantial burden requirement.

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[8] *See also, e.g., Guru Nanak Sikh Soc. of Yuba City* v. *County of Sutter*, No. S-02-1785, slip op. at 24 (E.D. Cal. Nov. 19, 2003) ("It is easy to identify these general principles [regarding substantial burden], as explained by the appellate courts; it is far more difficult to discern what they mean in the real world or apply them to real facts.").

On the high-threshold side, the Seventh Circuit in its decision below held that a regulation must "direct[ly], primar[ily], and fundamental[ly]" render religious exercise "effectively impracticable" anywhere in "the regulated jurisdiction generally." Pet. App. 13a. As explained, this is an exceptionally difficult standard to satisfy in the land use context. The Ninth Circuit has essentially adopted the Seventh Circuit's test based on dictionary definitions. See *San Jose Christian College*, 360 F.3d 1024, 1034-35. The Second Circuit takes a slightly different tack, holding that a law substantially burdens religious exercise only when it "denies" or "drastically restrict[s]" the "ability" to exercise religion. *Rector, Warden & Members of Vestry* v. *City of New York*, 914 F.2d 348, 355 (2d Cir. 1990). And despite this Court's teaching in *Employment Division* v. *Smith*, 494 U.S. 872, 886-87 (1990), that courts cannot weigh the significance of particular religious practices, the D.C. Circuit continues to analyze "the importance of a religious practice when assessing whether a substantial burden exists." *Henderson* v. *Kennedy*, 253 F.3d 12, 17 (D.C. Cir.) (analyzing whether the burden impacts a "'central religious belief or practice'"), *reh'g denied*, 265 F.3d 1072, 1074 (D.C. Cir. 2001) (reasserting appropriateness of "importance" analysis under RFRA/RLUIPA).

On the moderate-threshold side, the Fifth, Tenth and Eleventh Circuits and the Washington Supreme Court employ much more lenient tests. Consistent with this Court's decisions in *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963), and *Thomas* v. *Review Board of Indiana*, 450 U.S. 707, 717-18 (1981), these courts hold that a substantial burden is "pressure" that "*tends*" (*Midrash Sephardi, Inc.* v. *Town of Surfside*, ___ F.3d ___, 2004 WL 842527, at *9) or has a "'*tendency*'" (*Thiry* v. *Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996) (citation omitted and emphasis added)) to force adherents to forego religious precepts or act contrary to religious beliefs. Instead of having to prove a drastic

restriction or near impossibility, it is enough that government "significantly inhibit or constrain," "meaningfully curtail," or deny "reasonable opportunities" for religious exercise (*Thiry*, 78 F.3d at 1495 (internal quotation omitted)); or that it make religious assemblies "relatively inaccessible within the city limits" (*Islamic Center of Mississippi, Inc.* v. *City of Starkville*, 840 F.2d 293, 299-303 (5th Cir. 1988)); or even that it impose a "*financial* burden on religious activity," for example, "grossly diminish[ing] the value of the church's principal asset." *First Covenant Church* v. *City of Seattle*, 840 P.2d 174, 183-85 (Wash. 1992) (emphasis added).

Of particular note, after the filing of the petition, the conflict identified in the petition was significantly sharpened by the Eleventh Circuit's subsequent decision in *Midrash Sephardi, Inc.* v. *Town of Surfside*, ___ F.3d ___, 2004 WL 842527 (11th Cir. Apr. 21, 2004).[9] The Eleventh Circuit expressly rejected the high-threshold standard for substantial burden adopted by the Seventh Circuit in the decision below on the ground that it is inconsistent with RLUIPA: "[W]e decline to adopt the Seventh Circuit's definition" of substantial burden because it "would render [RLUIPA] § b(3)'s total exclusion prohibition meaningless." *Id.* at *9.[10] Instead, the Eleventh Circuit adopted its own version of a moderate-threshold test: "[A] 'substantial burden' must place more than an inconvenience on religious exercise; a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her

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[9] Again confirming the confusion that exists in the lower courts, *Midrash Sephardi* appears to represent a shift from the Eleventh Circuit's prior "substantial burden" stance. *Cf. Grosz* v. *City of Miami Beach*, 721 F.2d 729, 730 (11th Cir. 1983).

[10] RLUIPA's exclusion provision, 42 U.S.C. § 2000cc(b)(3), provides: "No government shall impose or implement a land use regulation that – (A) totally excludes religious assemblies from a jurisdiction; or (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction."

behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct." *Id.*

B. In the Religious Land Use Context, Conflicting Substantial Burden Standards Produce Different Substantive Results Even Under Closely Analogous Facts.

Because the outcome of the substantial burden analysis often determines whether a land use decision is subject to judicial scrutiny under the free exercise clause or RLUIPA, conflicting standards inevitably produce conflicting substantive results in an area of the law that is vital to religious organizations. For instance, the Seventh Circuit below held there was no substantial burden as long as churches could locate somewhere else in Chicago, even if the alternative facility was inconvenient or inadequate. In contrast, the Fifth Circuit in *Islamic Center of Mississippi*, 840 F.2d at 299, employing a moderate-threshold test, held that making religious assemblies even "relatively inaccessible within the city limits" created an "obvious[] burden [on] the exercise of religion."[11]

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[11] Similarly, several district courts applying the moderate approach have found a substantial burden under RLUIPA even though churches operated *existing* facilities. *See Castle Hills First Baptist Church* v. *City of Castle Hills*, ___ F.Supp.2d ___, 2004 WL 546792, *9 (W.D. Tex. Mar. 17, 2004) (finding substantial burden in city's denial of permit to use an unoccupied fourth floor of church building for Sunday school); *Westchester Day School* v. *Village of Mamaroneck*, 280 F.Supp.2d 230, 241-42 (S.D. N.Y. 2003), *appeal docketed*, No. 03-9042 (2d Cir. Oct. 8, 2003) ("It is the burden on the quality of religious education that concerns us here. While it is true that the students of WDS [a Jewish school] may still, without the special permit modification gather to pray and be educated, their religious experience is limited by the current size and condition of the school buildings. Moreover, WDS should be able, within reason, to accommodate the growing number of students who wish to pursue a Jewish education at WDS.") (internal citations omitted);

In practice, which test a court uses to assess substantial burden typically predetermines the outcome. It is noteworthy that *no* court applying the high-threshold test has ever found a substantial burden in the land use context, whereas courts applying the moderate-threshold test may or may not find substantial burden depending on the facts. See *Midrash Sephardi*, ___ F.3d ___, 2004 WL 842527, *9 (no substantial burden); *Thiry*, 78 F.3d at 1495-96 (same); *Islamic Ctr.*, 840 F.2d 298-99 (finding undue burden); *First Covenant*, 840 P.2d at 183-84 (finding impermissible burden).

The difference lies in the nature of the inquiry. Because the high-threshold standard probes only for outright preclusion, near impossibility, or some sort of drastic restriction, a simple showing of a theoretical alternative land use site (an actual, suitable alternative site is almost never available or the church would not be litigating) will generally end the analysis. Once that is found, the burden and inconvenience to the church are deemed virtually irrelevant. On the other hand, the moderate-threshold standard requires a more nuanced, fact-intensive analysis to determine whether the regulation actually imposes a bona fide religious hardship on the claimant, *i.e.*, whether it meaningfully curtails or makes significantly more costly religious exercise.[12] When the test severely constricts the facts a trial court may consider in this initial inquiry – as in

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Cottonwood Christian Center v. *Cypress Redev. Agency*, 218 F.Supp.2d 1203, 122-27 (C.D. Cal. 2002) (finding substantial burden in denial of permit to build a larger worship site because applicant, which already operated a smaller facility, showed "a religious need to have a large and multi-faceted church"); *Murphy* v. *Town of New Milford*, 289 F. Supp. 2d 87, 113 & n.29 (D. Conn. 2003) (holding that an order capping those who could gather for home-based prayer meetings constituted a substantial burden).

[12] Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 Harv. L. Rev. 1175, 1216 (1996) ("The very concept of a substantiality test implies a subjective weighing process. Judicial inquiry under a substantiality test must therefore be subjective if courts are to be sensitive to different contexts.").

the Seventh Circuit's high-threshold test – religious land users have little if any chance of prevailing under RLUIPA.

In short, the doctrinal and theoretical conflicts set forth above and in the petition result in starkly conflicting outcomes in religious land use cases. Under the standard established by the Seventh Circuit below and the Ninth Circuit, a church's RLUIPA claim will nearly always fail even when a religious hardship is the result of an arbitrary regulation. However, in the Fifth, Tenth, and Eleventh circuits and in the State of Washington, under identical facts, a church's showing of religious hardship will result in a successful RLUIPA claim. This intolerable conflict, which must ultimately be resolved by this Court, will only grow as ever more RLUIPA cases wend their way through the federal and state courts. This Court's review is richly warranted.

C. The High Threshold Established by the Decision Below Conflicts in Principle with this Court's Prior Decisions and Teachings Concerning Substantial Burden.

Lastly, this Court's prior free exercise decisions have not required that religious exercise be precluded or rendered practically impossible but rather (as noted above) that government action create a non-trivial religious hardship. As explained in the petition, the Seventh Circuit's creation of such an onerous substantial burden test creates fundamental tension with this Court's free exercise decisions.

Indeed, the decision below is flatly contrary to the key assumptions underlying this Court's decision in *Employment Division* v. *Smith*, 494 U.S. 872, 885 (1990). In *Smith*, this Court described the substantial burden requirement as merely one of "religious hardship," a formulation it later reaffirmed in *Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520, 537 (1993) (strict scrutiny applies when a regime of "individualized exemptions" is not extended "to cases of 'religious hardship'"). This Court's moderate-threshold test

for substantial burden was central to the holding in *Smith*. *Smith* was based on this Court's view that, because the substantial burden test is relatively easy to satisfy, neutral laws of general application must be evaluated under a more deferential test than strict scrutiny, lest the federal courts continuously be placed in the untenable position of dispensing religious-based exemptions to innumerable general laws. *Smith*, 494 U.S. at 885. In other words, it was precisely because of the moderate threshold of the substantial burden standard that this Court was reluctant to open up all neutral and generally applicable laws to strict scrutiny review.

Where strict scrutiny continues to apply, however – such as where laws require individualized assessments – these concerns are not implicated. In those contexts, it makes no sense for the substantial burden test to be as strict as the Seventh Circuit's approach. In fact, the standard articulated below would turn *Smith* on its head. It makes the substantial burden requirement so onerous that even those regulations that *Smith* recognizes as subject to the substantial burden/strict scrutiny standard would be effectively immune from challenge in all but the most extreme cases.

The Seventh Circuit's approach conflicts with the most basic assumptions of this Court's modern free exercise decisions. This Court should grant review to resolve this important doctrinal conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 7, 2004

ADDENDUM

ADDENDUM

American Jewish Congress is an organization of American Jews founded in 1918 to protect the religious, political, civil, and economic rights of American Jews. It has taken a special interest in religious liberty issues. Its legal staff played a significant role in drafting RLUIPA.

Baptist General Conference ("BGC") is an association of 1,005 Baptist churches located throughout the United States. Many of BGC's affiliated churches are new, and many others are growing. As BGC churches have sought zoning approval for new property acquisition or the expansion of existing church sites, they have received varying responses from local governments. BGC would welcome this Court's clarification of the rights of churches under the Free Exercise Clause of the First Amendment and RLUIPA.

The Church of Jesus Christ of Latter-day Saints is a Christian denomination with over twelve million members worldwide. Due to rapid growth, the Church has an active program for constructing temples and chapels. In the course of its building program, the Church frequently encounters the types of land use problems at issue in this case. Although many local officials work with the Church in good faith to address legitimate land use concerns, the Church often confronts arbitrary or discriminatory land use decisions. In the Church's experience, a proper interpretation of RLUIPA's substantial burden test is essential to ensure that land use regulations are administered consistent with genuine respect for religious liberty. Moreover, the Church provided testimony to Congress during hearings which led to the enactment of RLUIPA. It has an interest in courts interpreting RLUIPA in a manner that comports with congressional intent.

Evangelical Lutheran Church in America ("ELCA") is the largest Lutheran denomination in North America and the fifth largest Protestant church body in the United States. The

ELCA has approximately 11,000 member congregations, which in turn have approximately 5.1 million individual members nationwide. Through the adoption of social statements by the ELCA Churchwide Assembly, the church's highest legislative body, the ELCA adopts policy positions on issues of public importance. Through the Lutheran Office of Governmental Affairs in Washington, D.C., the ELCA engages in advocacy on public policy issues before the Congress of the United States of America. The ELCA supports an interpretation of RLUIPA that provides effective protection for religious land uses against arbitrary and discriminatory regulations.

General Council on Finance and Administration of the United Methodist Church ("GCFA") is a national agency of The United Methodist Church that supports local churches with financial and property administration issues. GCFA is regularly called on by local United Methodist churches for advice and assistance in situations where local governments are blocking improvements or construction of United Methodist churches for reasons which appear to be an unreasonable burden on their right and ability to congregate and practice their religion. GCFA has found that these burdens are often supported by pretextual decisions concerning land use or traffic patterns. It believes this case could substantially affect the power of local governments to limit the right of United Methodists to practice their religion in the communities where they live.

Clifton Kirkpatrick, as Stated Clerk of the General Assembly, is the senior continuing officer of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is a national Christian denomination with nearly 2.5 million members in more than 11,200 congregations, organized into 173 presbyteries under the jurisdiction of 16 synods. Through its antecedent religious bodies, it has existed as an organized religious denomination within the current boundaries of the United States since 1706. In their efforts to construct houses

of worship, its congregations have been subjected to arbitrary and discriminatory land use regulations. This brief is consistent with the policies adopted by the General Assembly regarding the religious liberty guarantees of the First Amendment. The General Assembly does not claim to speak for all Presbyterians, nor are its decisions binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of respect and prayerful consideration of all the denomination's members.

General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist Church and represents nearly 54,000 congregations with more than 12.8 million members worldwide. The North American Division of the General Conference administers the work of the church in the United States, Canada, and Bermuda, and represents more than 4,600 congregations in the United States with more than 918,000 members. As a growing denomination in a multitude of political jurisdictions, each with its own zoning laws and ordinances, the Seventh-day Adventist Church would welcome Supreme Court clarification of its rights under RLUIPA and the federal Constitution.

First Jurisdiction of Illinois, Church of God in Christ is an affiliation of 115 churches with over 15,000 total members. Its mission is to spread the Gospel of Christ, and to partner with community-based social service providers to improve the spiritual climate and the health and well-being of the communities where its churches are located. Its churches occupy a variety of buildings, from storefronts to newly-built churches. Some of its members have encountered a variety of challenges related to local land use regulations, and it strongly supports the protection of religious liberty in the land-use context. As a predominately African-American denomination,

First Jurisdiction-Illinois supports this brief to limit the excessive discretion given to local zoning boards. Too often that discretion appears to be used consciously and subconsciously to discriminate based on race.

Foundation for the Preservation of the Mahayana Tradition ("FPMT") is an international network of Tibetan Buddhist organizations in the Gelugpa tradition. A central entity that coordinates certain activities of FPMT's many affiliates in the USA and abroad is Foundation for the Preservation of the Mahayana Tradition, Inc., the Spiritual Director of which is Lama Thubten Zopa Rinpoche. There are at present approximately 130 centers worldwide affiliated with FPMT, thirteen of which are in the United States and which include centers for Buddhist studies, retreat centers, monasteries and nunneries, hospices, elementary schools, and more. FPMT owns property in various locations in the United States. Participating in Buddhist ceremonies, services, meditation retreats, and other religious events, which take place in retreat centers, meditation cabins, temples, and other buildings of religious importance on these properties, is central to Buddhist practices. However, FPMT has struggled with local government officials over building permits to develop needed buildings on its properties. Thus, FPMT has a strong interest in the preservation and strengthening of the protections intended under RLUIPA, including clarity on the application of the "substantial burden" test.

International Church of the Foursquare Gospel ("ICFG") was established in 1927 to propagate and disseminate the principles of Christianity embraced in the Foursquare Gospel. As a hierarchical church, the ICFG operates Foursquare Gospel churches in the United States, and around the world. As of the year 2003, there were 1,888 Foursquare churches in the 50 states of the U.S. having 235,852 members and 4,879 credentialed ministers. There are over 5 million adherents worldwide attending some 32,000 Foursquare churches. In the operations of its many churches, ICFG is a landowner and

builder of church related structures in many communities across the country. In many additional communities, ICFG is a tenant user of properties owned by others. In both capacities, ICFG has been subject to and complied with local land use laws, zoning laws, and building and safety codes, though with increasing difficulty. Unfortunately, ICFG's experience has been that such laws are not infrequently administered in a manner which, in its view, reflects a bias against religious organizations and their activities. As a U.S. based church comprised largely of American citizen congregants, ICFG is increasingly concerned about the erosion of religious liberty that it perceives. With the passage of RLIUPA, ICFG was cautiously optimistic that the erosion of religious liberty with respect to property rights had been stemmed. However, recent interpretations and applications of RLIUPA by some courts have seriously compromised the protections ICFG believes the Congress intended to provide by RLIUPA. The questions presented in this case put the issue squarely to the fore. ICFG's concern and its perceived duty as citizens prompt its interest and involvement in this brief.

Union of Messianic Jewish Congregations, founded in 1979, is an affiliation of 90 congregations worldwide committed to pooling their resources to establish Jewish congregations that affirm Jesus as Messiah. Like all religious organizations, it recognizes the need for its faith community to gather together, in its case to further the initiation, establishment, and growth of Messianic Jewish Congregations and to aid in causes of the Jewish people worldwide. Its congregations – ranging from small, home-based groups to large communities of several hundred members – have confronted land use restrictions that seriously inhibit its religious mission.

Worldwide Church of God began in the early 1930's in Eugene, Oregon. In 1947, it was incorporated in California, where it maintains its worldwide headquarters. The Church

has congregations throughout the United States and affiliate churches in many foreign countries. The Church owns property at its headquarters site and in other parts of the United States. The Church has encountered in the past, and anticipates encountering in the future, conflicts with governmental officials over building codes and regulations, zoning, and related issues. The Church has a poignant interest in the preservation of RLUIPA in order to have a vehicle by which it can adjudicate arbitrary and capricious governmental conduct regarding the use of its properties.

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Petitioners,

v.

CITY OF CHICAGO,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

OBJECTION TO MOTION BY THE BECKET FUND FOR RELIGIOUS LIBERTY, ET AL., FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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No. 03-1397

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CIVIL LIBERTIES FOR URBAN BELIEVERS, CHRIST CENTER, CHRISTIAN COVENANT OUTREACH CHURCH, HIS WORD MINISTRIES TO ALL NATIONS, CHRISTIAN BIBLE CHURCH, CHURCH ON THE "WAY" PRAISE CENTER, and MONTE DE SION (MOUNT ZION) CHURCH,

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Respondent, the CITY OF CHICAGO, by its attorney, MARA S. GEORGES, Corporation Counsel of the City of Chicago, hereby objects to the motion by the Becket Fund for Religious Liberty and various religious organizations [hereafter referred to collectively as "the Becket Fund"] for leave to file brief as *amici curiae* in support of petitioners, and states the following in response:

1. The Becket Fund seeks leave to file a brief as *amici curiae* that urges review of an issue that is not included in the questions presented by petitioners. For this reason, the City of Chicago did not consent when the Becket Fund contacted us, and we now object to the filing of the brief.

2. The Becket Fund urges review of only one aspect of the court of appeals' opinion in this case: the court's determination that Chicago's zoning ordinance is not the type of system of individualized exemptions that triggers heightened review under the Free Exercise Clause. The Becket Fund argues that this court's review is needed to address a purported conflict concerning the meaning and consequences of the term "individualized assessments" in this Court's free exercise jurisprudence. See Brief of *Amicus Curiae* the Becket Fund 6. As the Becket Fund readily admits, any issue concerning the scope of the individualized assessments doctrine is "in addition to the questions presented by petitioners." Ibid. And, indeed, the petitioners made only brief mention of the individualized assessments doctrine in a footnote. See Pet. 23-24 n.8. Moreover, as we explain in our brief in opposition, even that cursory argument is waived because it is not fairly included in either of the questions presented. See Brief for Respondent in Opposition 24-25 n.10. Thus, in confining the *amicus* brief to that issue, the Becket Fund urges review of this case on a ground

upon which the petitioners themselves have waived review. See this Court's Rule 14.1(a).

3. While an issue may be fairly included in a question presented if it is a "'predicate to intelligent resolution'" of a question presented, Vance v. Terrazas, 444 U.S. 252, 258-59 n.5 (1980), the question whether Chicago's zoning ordinance is a system of individualized exemptions is not a predicate to either of the petitioners' questions. In this case, petitioners' first question presented concerns only the Equal Protection Clause, which obviously does not relate to the free exercise issue that the Becket Fund presses. And petitioners' second question concerns the nature of a "substantial burden" within the meaning of the Free Exercise Clause and RLUIPA. It is unnecessary to resolve any conflict regarding whether a zoning ordinance creates a system of individualized assessments in order to review that question. Indeed, as petitioners acknowledge, even if Chicago's zoning provisions create a system of individualized assessments, that only begs the question whether churches are substantially burdened by those provisions. See Pet. 23 n.8.

4. The Becket Fund's entire brief is dedicated exclusively to this waived argument. And this Court ordinarily will not consider an issue raised by *amici* where the petitioner has not pursued the issue in the petition for certiorari. See, e.g., Kamen v. Kemper Financial Services, Inc., 500 U.S. 90, 97 n.4

(1991); United States v. Dion, 476 U.S. 734, 746 (1986); United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 60 n.2 (1981). Since the Becket Fund has addressed only this waived issue, there is no reason for the Court to consider that brief in determining whether to grant review on the two issues raised in the petition.

WHEREFORE, the respondent, the City of Chicago, objects to the motion for leave to file a brief as *amicus curiae* in support of petitioners, and respectfully requests that the motion be denied.

Respectfully submitted,

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No. 03-1397

CIVIL LIBERTIES FOR URBAN BELIEVERS, et al.,

Petitioner,

v.

CITY OF CHICAGO,

Respondent.

CERTIFICATE OF SERVICE

I certify that I served all parties required to be served with the Objection to Motion by the Becket Fund for Religious Liberty, et al., for Leave to File Brief as Amici Curiae in Support of Petitioners by placing a copy of the objection in envelopes addressed to the persons named below, at the addresses indicated, and delivering those envelopes to a third-party commercial carrier for overnight delivery on May 12, 2004.

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On Petition for a Writ of Certiorari to the
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OBJECTION TO MOTION BY AMERICAN JEWISH CONGRESS, ET AL., FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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OBJECTION TO MOTION BY AMERICAN JEWISH CONGRESS, ET AL., FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Respondent, the CITY OF CHICAGO, by its attorney, MARA S. GEORGES, Corporation Counsel of the City of Chicago, hereby objects to the motion by the American Jewish Congress, et al., for leave to file brief as *amici curiae*, and states the following in support of its objection:

1. The American Jewish Congress, et al., primarily urge review of the court of appeals' determination that Chicago's zoning ordinance does not substantially burden churches. These

amici argue that this Court's review is needed on the general issue of siting churches and other religious centers based on instances in other cities and towns in which particular religious establishments have been unable to locate under other zoning laws. *Amici* do not comment at all on the record in this case, nor do they explain why this case is an appropriate vehicle for addressing the issue they press. Indeed, Amici's brief reflects no familiarity with the record in this case. For that reason, leave to file the proposed *amicus* brief should be denied.

2. The proposed *amicus* brief primarily discusses a host of problems that a church may encounter when a zoning ordinance either prohibits or significantly constrains construction or expansion of houses of worship, leading to overcrowding. See AJC Br. 3-4. *Amici* never explain what any of the anecdotes have to do with this case. *Amici* also discuss anecdotal evidence (not in the record and not involving Chicago) that zoning laws are frequently used to prevent new churches from opening. See id. at 4-11. Whatever problems might be presented in a case where a particular church has been targeted for discriminatory treatment or has been effectively excluded from a jurisdiction, those problems are not presented by the record in this case. Since *amici* completely ignore that record, their brief is not useful in assessing whether review of this case is warranted.

3. Indeed, these *amici* make no reference to the actual

zoning provisions at issue in this case or to the evidence in the record that relates to the question whether petitioners are, in fact, substantially burdened by Chicago's ordinance. An *amicus* brief utterly indifferent to the facts of the case before the Court is surely not appropriate for consideration with respect to the petition for certiorari.

WHEREFORE, the respondent, the City of Chicago, objects to the motion of the American Jewish Congress, et al., for leave to file a brief as *amici curiae* in support of petitioners, and respectfully requests that the motion be denied.

Respectfully submitted,

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Petitioner,

v.

CITY OF CHICAGO,

Respondent.

CERTIFICATE OF SERVICE

I certify that I served all parties required to be served with the Objection to Motion by the American Jewish Congress, et al., for Leave to File Brief as Amici Curiae in Support of Petitioners by placing a copy of the objection in envelopes addressed to the persons named below, at the addresses indicated, and delivering those envelopes to a third-party commercial carrier for overnight delivery on May 12, 2004.

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